IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

No. 75-1278

FRED DOYLE,

Respondent,

vs.

MT. HEALTHY CITY SCHOOL DISTRICT BOARD OF EDUCATION,

Petitioner.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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TO THE HONORABLE SUPREME COURT OF THE UNITED STATES OF AMERICA:

Petitioner, the Mt. Healthy City School District Board of Education, respectfully petitions this Honorable Court to grant a writ of certiorari to the United States Court of Appeals for the Sixth Circuit to review a judgment of that Court which affirmed the order of the United States District Court, Southern District of Ohio, reinstating the Respondent and awarding him compensatory damages but reversed the District Court as to the award of attorneys' fees.

OPINION OF THE COURTS BELOW

The decision and opinion of the United States Court of Appeals for the Sixth Circuit is attached hereto at App. pp. 18a-19a. The decision and opinion of the United States District Court for the Southern District is attached hereto at App. pp. 1a-17a. Neither opinion has been reported officially.

JURISDICTION

The judgment of the Court of Appeals was entered on December 10, 1975. The jurisdiction of this Court is evoked under 28 U.S.C. § 1254 (1).

QUESTIONS PRESENTED

1. Whether the District Court has jurisdiction over this suit since the Mt. Healthy Board of Education is not a "person" within the meaning of 42 U.S.C. § 1983 and the plaintiff could not properly contemplate $10,000 as the amount in controversy for a suit under 28 U.S.C. § 1331?

2. Whether the Mt. Healthy City School District Board of Education is immune from suit under the sovereign immunity protection of the Eleventh Amendment of the United States Constitution?

3. Whether a Board of Education can be forced to give a continuing contract to a non-tenured teacher it considers too immature for the position, if one of the many factors on which the Board's decision is based is a telephone call to a local radio station, such call allegedly being within the First Amendment rights of the teacher?

CONSTITUTIONAL PROVISIONS INVOLVED

U.S. Constitution, Amendment I

Congress shall make no law . . . abridging the freedom of speech . . . .

U.S. Constitution, Amendment XI

The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another State, or by citizens or subjects of any foreign State.

FEDERAL STATUTES INVOLVED

28 U.S.C., Section 1331

§ 1331. Federal question; amount in controversy; costs

(a) The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States.

(b) Except when express provision therefor is otherwise made in a statute of the United States, where the plaintiff is finally adjudged to be entitled to recover less than the sum or value of $10,000, computed without regard to any setoff or counterclaim to which the defendant may be adjudged to be entitled, and exclusive of interests and costs, the district court may deny costs to the plaintiff and, in addition, may impose costs on the plaintiff.

42 U.S.C., Section 1983

§ 1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities se-

cured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

STATUTES INVOLVED

STATEMENT OF THE CASE

This case originated in a suit filed by Fred Doyle, Respondent, against the Mt. Healthy Board of Education, its members individually, and the Superintendent, for reinstatement, compensatory and punitive damages under 42 U.S.C. § 1983, 28 U.S.C. §§ 1331, 1343 (3) and 1343 (4). Doyle alleged that his limited teaching contract was not renewed in retaliation for the exercise of his constitutionally protected First Amendment rights; in particular he cited a telephone call to a local radio station criticizing the faculty dress code. Petitioners responded that Doyle's contract was not renewed as the result of a routine annual review of his performance as a teacher and not in retaliation for the exercise of his constitutionally protected rights.

The District Court ordered the Board to reinstate Doyle and to grant him a continuing contract. The Court awarded $5,158.00 as damages and an additional $6,343.16 in attorneys' fees. The Court further rendered judgment in favor of the individual Board members and the superintendent. Costs were to be assessed against the Board. In its findings the Court concluded that one impermissible reason — the telephone call to the radio station — played a substantial part in Doyle's non-renewal.

The Board appealed to the Court of Appeals for the Sixth Circuit and that Court affirmed the reinstatement and the compensatory damages but vacated the award of attorney fees.

REASONS RELIED UPON FOR ALLOWANCE OF THE WRIT

1. THE DISTRICT COURT DOES NOT HAVE JURISDICTION OF THIS MATTER.

a. A board of education is not a "person" under 42 U.S.C. § 1983 subject to money damages.

Section 1983 of Title 42 of the United States Code provides in pertinent part that "every person . . . who under color of state law . . . subjects or causes any citizen to be deprived of any civil rights . . . is liable for personal injuries."

Many jurisdictions have held that school boards are not persons under 42 U.S.C. § 1983. *See Singleton* v. *Vance County Board of Edn.*, 501 F.2d 429 (4th Cir. 1974); *Sterzing* v. *Fort Bend Indep. Sch. Dist.*, 496 F.2d 92 (5th Cir. 1974); *Brown* v. *Board of Education of City of Chicago*, 386 F.Supp. 110 (D.C. Ill. 1974); *Howell* v. *Winn Parish School Board*, 377 F.Supp. 816 (D.C. La. 1974); *Lopez* v. *Williams*, 372 F.Supp. 1279 (S.D. Ohio 1973); *Pelisek* v. *Trevor State Graded School Dist. No. 7, Salem Wis.*, 371 F.Supp. 1064 (E.D. Wis. 1974); *Vanderzanden* v. *Lrowell School District No. 71*, 369 F.Supp. 67 (Ore. 1974); and *Bichrest* v. *School Dist. of Philadelphia*, 346 F.Supp. 249 (E.D. Pa. 1972). *Courtney* v. *School Dist. No. 1, Lincoln County, Wyo.*, 371 F.Supp. 401, 403 (Wyo. 1974), and *Porcelli* v. *Titas*, 302 F.Supp. 726, 730 (N.J. 1969), both recognized the issue as a valid one to be de-

cided on the basis of the particular state law. The Ohio case — *Lopez* v. *Williams,* supra — held boards were not "persons" under Section 1983.

Cases arising under 42 U.S.C. § 1983 have distinguished between plaintiffs who ask for injunctive or other equitable relief and those seeking money damages. The latter suits have regularly been barred. *Monroe* v. *Pape,* 365 U.S. 167, 187-92, 81 S.Ct. 473, 5 L.Ed.2d 492 (1961). In *City of Kenosha* v. *Bruno,* 412 U.S. 507, 93 S.Ct. 222, 37 L.Ed.2d 109 (1973), the Court went further to state that Congress never intended courts to distinguish between the meaning of "persons" in Section 1983 depending on whether equitable or money remedies were sought; in neither case were government entities "persons" under Section 1983.

In *Lopez* v. *Williams,* 372 F.Supp. 1279 (S.D. Ohio, E.D. 1973), the court reached the same conclusion. *Lopez* was a Section 1983 suit brought by students against the school district for improper suspension. The court held that the "board of education was a political subdivision of the state and was therefore not a 'person' within the meaning of the federal civil rights statute, 42 U.S.C.A. § 1983. Accord: *Kramer* v. *Scioto Darby School District,* (U.S.D.C., S.D. Ohio, E.D.), Case No. 72-406, decision March 7, 1974; *Gilliam* v. *Lewis, et al.,* (U.S.D.C., S.D. Ohio, E.D.), Case No. C2-73-287, decision March 26, 1974. It follows that the Mt. Healthy Board of Education is not subject to suit under 42 U.S.C. § 1983.

b. Plaintiff has never had a claim that could be valued at $10,000 and therefore can not bring the suit under 28 U.S.C. § 1331.

In discussing the relationship between 42 U.S.C. § 1983, which grants immunity to municipal corporations, and 28

U.S.C. § 1331, which does not, the Second Circuit in *Brandt* v. *Town of Milton,* 43 LW 2388 (2/14/75), noted that the two were consistent in that § 1331 "preserves the municipality's immunity as to actions not involving this minimum sum." Consequently a close scrutiny of the amount in controversy is required before § 1331 jurisdiction attaches.

Doyle originally asked for reinstatement and $50,000 in punitive damages, court costs and attorney fees. Section 1331 provides that, in computing the amount in controversy, interest and costs are to be excluded. Under *Alyeska* v. *Wilderness Society,* 421 U.S. 240 (1975), the Court reasoned that attorneys' fees were like costs and would not be awarded absent statutory authority. On the basis of *Alyeska,* the Sixth Circuit held in the instant action that attorneys' fees would not be granted. In *Sincock* v. *Obaro,* 320 F.Supp. 1098 (D. Del. 1970), and *Cupples Co. Mfg.* v. *Farmers & Merchants State Bank,* 390 F.2d 184 (5th Cir. 1968), jurisdiction was refused for failure to have a sufficient amount in controversy after attorneys' fees were excluded.

The District Court in this case refused to award punitive damages, therefore plaintiff's only claim is for reinstatement. The value of the reinstatement claim, however, was never as much as $10,000. Doyle filed the suit July 13, 1971 yet at that time, according to his own testimony, he had already found other employment at Miami Trace. Consequently, the most he could anticipate in damages was the difference between his anticipated salary at Mt. Healthy and his actual wages at Miami Trace. This amount was calculated by the District Court to be a total of $5,158.00 for the *three years* it took for the case to come to judgment. When the suit was filed the difference in income anticipated for the coming year could not have been

more than $2,500. In sum, Doyle lacked the necessary $10,000 amount in controversy to bring the suit under 28 U.S.C. § 1331.

2. THE MT. HEALTHY CITY SCHOOL DISTRICT BOARD OF EDUCATION IS IMMUNE FROM SUIT UNDER THE SOVEREIGN IMMUNITY PROTECTION OF THE ELEVENTH AMENDMENT OF THE UNITED STATES CONSTITUTION.

a. The Mt. Healthy Board of Education is a governmental entity entitled to Eleventh Amendment immunity from money damages.

The Eleventh Amendment of the United States Constitution provides that no state is subject to suit by a citizen of another state. The Supreme Court in *Hans* v. *Louisiana,* 134 U.S. 1, 10 S.Ct. 504 (1890), extended the doctrine of sovereign immunity to suits brought by citizens against their own state. Accord: *Scheuer* v. *Rhodes,* 94 S.Ct. 1683 (1974).

The question as to whether a state agency, such as the local board of education, is entitled to sovereign immunity is for the federal court to decide. However, that decision must be made in the context of state law. In *Gordenstein* v. *University of Delaware,* 381 F.Supp. 718, 720 (Del. 1974), the court described the relationship.

> "In determining whether an entity like the University is so closely related to the state as to share its Eleventh Amendment shield, it will ordinarily be the law of the state which defines the relationship. State law is the context in which the matter is to be determined, but it does not provide the controlling rule of law."

In Ohio, the legislative scheme assumes that the board of education is immune from money damages. Section 3313.203 of the Ohio Revised Code provides that boards may purchase liability insurance for school officers, employees and pupils, but boards are not given similar authority on their own behalf.

The legislative assumption is supported by Ohio case law. Courts have repeatedly held school boards not liable in tort actions. *Hall* v. *Board of Edn.,* 32 Ohio App. 2d 297 (1972); *Shaw* v. *Board of Edn.,* 17 Ohio Law Abs. 588 (1934); and *Board of Edn.* v. *Volk,* 72 Ohio St. 469 (1905). The rationale for immunity in these cases is that since the board is not authorized to raise taxes or sell property to pay a tort claim, "surely the law does not contemplate a right of action in the Plaintiff without any remedy to enforce it." *Volk, supra* at 480. This pocketbook test has been applied in federal jurisdictions with the same result. See *Jordan* v. *Gilligan,* 500 F.2d 701 (6th Cir. 1974); *Shehan* v. *Board of Trustees, Bloomsburg State College,* 501 F.2d 31 (3rd Cir.), and *Sincock* v. *Obana,* 320 F.Supp. 1098 (Del. 1970). See also *Thonen* v. *Jenkins,* 517 F.2d 3 (4th Cir. 1975).

When jurisdictions have permitted money damages against boards of education the same pocketbook test has been applied and the court has found that the school authority had the power and resources to pay the judgment. In *Gordenstein* v. *University of Delaware,* 381 F.Supp. 718 (1974), the court found that the University could raise the funds without further action by the state legislature, 381 F.Supp. at 721, and in *Fabrizio & Martin, Inc.* v. *Board of Edn. of Central School District No. 2,* 290 F.Supp. 945 (N.Y. 1968), state law specifically authorized the school district to pay judgments against the school district by levying taxes. 290 F.Supp. at 948. No

such finding was made in the instant case and there is no similar legislation in Ohio.

While some courts, for example *Harkless* v. *Sweeney Indep. School Dist.*, 427 F.2d 319 (5th Cir. 1970), *cert. denied*, 400 U.S. 991 (1971), have held that claims for backpay by teachers are part of the equitable relief for reinstatement and, therefore, not damages, that has not been the rule in Ohio. The only school cases we have found in Ohio where immunity has not been a bar to suit have involved equitable damages *when the public treasury is not directly at issue. State ex rel. Board of Education* v. *Gibson*, 130 Ohio St. 318 (1935), involved the issue of whether the plaintiff board was immune from the statute of limitations and therefore in a position to collect tuition from non-residents even though the six year limitation had lapsed. *Akron Board of Education* v. *State Board of Education*, 490 F.2d 1285, *cert. den.* 417 U.S. 932 (6th Cir. 1974), was to restrain the transfer of land to an adjoining district. *Wayman* v. *Board of Education*, 5 Ohio St. 2d 248 (1966), dealt with whether a Board could be ordered to stop maintaining a nuisance (a parking lot). *Lopez* v. *Williams*, 372 F.Supp. 1279 (S.D. Ohio 1973), *aff'd sub nom. Goss* v. *Lopez*, 419 U.S. 565 (1975), was concerned with the constitutionality of the pupil's suspension; damages were not in contention. Doyle, unlike these plaintiffs, is claiming more than $10,000 in damages. Consequently, the facts in the present case do not merit overturning the Ohio precedent.

b. The Board's immunity has not been waived.

The Ohio Constitution provides in Article 1, Section 16, that suits may be brought against the State as provided by law. *Board of County Commissioners of Mahoning*

County v. *Rhodes*, 86 Ohio Law Abs. 390, 177 N.E.2d 557 (C. P. Franklin County, 1960), explained that Article 1, Section 16, was not self-executing. Absent enabling legislation, a suit may not be brought. The state legislature has not waived immunity for school boards. Sections 2743.01-2743.20 of the Ohio Revised Code, which waive state immunity and create a special court of claims for such suits, specifically exclude school districts from those governmental agencies to which the waiver applies.

Section 3313.17 of the Revised Code describes the powers of boards of education which include the capacity of "suing or being sued." The statute, however, has been construed very narrowly; boards have not been held liable in tort claims. *Shaw* v. *Bd. of Edn.*, supra; *Hall* v. *Bd. of Edn.*, supra; *Bd. of Edn.* v. *Volk*, supra.

Brown v. *Board of Edn.*, 20 Ohio St. 2d 68 (1969), construed Section 3313.17 of the Revised Code to permit suit in a state court only in conjunction with other powers conferred by statute, including that of "contracting and being contracted with." Since boards of education have specific powers to acquire real property, the board in *Brown* could be sued for adverse possession. In the present case, however, the action is in tort, and, therefore, the *Volk* analysis applies.[1]

Finally it should be noted that courts have repeatedly held that neither the Fourteenth Amendment nor the Civil Rights Act constitutes an effective waiver of sovereign immunity. See *Corbean* v. *Xenia City Board of Edn.*, 366 F.2d 480 (6th Cir. 1966); *Cuiska* v. *City of Mansfield*, 250 F.2d 700 (6th Cir. 1957); *Thatcher* v. *Board of Trustees of Ohio State University*, 58 Ohio Op. 45, 277 N.E.2d 818 (1971).

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[1] Doyle could not bring the suit for breach of contract because he was non-tenured and his two year limited contract expired.

3. THE COURT BELOW ERRED IN CONCLUDING THAT THE BOARD REFUSED TO REINSTATE DOYLE FOR A CONSTITUTIONALLY IMPERMISSIBLE REASON.

a. The Board was not compelled to give any reasons for its decision to not renew Doyle's limited contract. In including the telephone call to the radio station as an illustration of Doyle's lack of tact, the Superintendent did not violate the teacher's First Amendment rights.

Fred Doyle had a limited contract with the Mt. Healthy Board. Section 3319.11, Ohio Revised Code, sets out the procedures for employment of teachers on a limited contract; should the board choose not to renew a limited contract, it is not required to give reasons for that decision. In *De Long* v. *Board of Education,* 37 Ohio App. 2d 69, 306 N.E.2d 774, *aff'd* 36 Ohio St. 2d 62 (1973), the court upheld the refusal of a school board to rehire a teacher without giving any reasons at all. Similarly, *Orr* v. *Trinter,* 29 Ohio Misc. 149, 444 F.2d 128 (1971), reversing 29 Ohio Misc. 62, 318 F.Supp. 1041 (1970), held that a public school teacher who has not attained tenure status and whose contract of employment is not renewed does not have a constitutional right to be told the reason for the non-renewal, nor to a hearing. See also *Conque* v. *Gausche,* 5th Cir. 3/14/75, *cert. denied* 10/14/75; *Board of Trustees of University of Tennessee* v. *Soni,* 513 F.2d 347 (6th Cir. 1975), *petition for cert. filed* 7/29/75; *Cusumano* v. *Ratchford,* 507 F.2d 980 (8th Cir. 1975); *Jeffries* v. *Turkey Run Consolidated School Dist.,* 492 F.2d 1 (7th Cir. 1974).

It is not disputed that the Board could have not renewed Doyle's contract without giving any reason. In fact, in its official communication, the Board did just that. Doyle's claim, however, stems from a letter written at

his request by the Superintendent. In that letter the Superintendent gave one reason for the non-renewal:

> "You have shown a notable lack of tact in handling professional matters which leaves much doubt as to your sincerity in establishing good school relationships."

The Superintendent offered two illustrations of Doyle's lack of tact: an obscene gesture he made to students and the phone call. The letter standing alone does not justify a conclusion that the Board based its decision substantially on the phone call because (1) the Superintendent wrote the letter and (2) in it expressly stated that the reason was Doyle's lack of tact. When the Board members were questioned individually as to the reasons for their decision they mentioned several incidents in which they thought Doyle had failed to show an ability to handle his responsibilities including an incident arising out of an altercation wtih a faculty member which resulted in the school having to be closed at noon, a problem occurring when Doyle confronted the cafeteria staff demanding a larger portion of spaghetti, a time when Doyle referred to some trouble-making boys as "sons of bitches," and his management of a cafeteria fighting incident, as well as the obscene gesture and phone call.

The constitutional test for the violation of a teacher's First Amendment rights was developed in *Pickering* v. *U.S.,* 391 U.S. 563 (1968), where the court considered the dismissal of a teacher who sent a letter to a local newspaper critical of the manner in which the Board had handled a bond issue. In holding in favor of the teacher, the Court noted the need to balance the First Amendment claims of the teacher against the need for orderly school administration. 391 U.S. at 568.

In applying this balancing test an Indiana court in *Knarr* v. *Board of School Trustees of Griffith, Indiana,* 317 F.Supp. 832 (1970), *aff'd* 452 F.2d 649 (7th Cir. 1972), refused to order the reinstatement of a teacher dismissed in part because of insubordination. One example of the teacher's improper behavior occurred when he was requested to discuss the school dress code and enlist student support. Instead he advised his class that they could defeat the administration by violating the code en masse because the school could not send everyone home. Other reasons included his disparaging comments about school administrators and other personnel. Plaintiff had alleged he was not given tenure because of his union activities but the court did not sustain such a finding.

The district court noted the broad discretion entrusted to the Board especially when considering whether to offer tenure and concluded in 317 F.Supp. at 836:

> "In denying Plaintiff tenure the school administrators were not acting with a desire to deprive Plaintiff of his freedoms of speech and association. The First Amendment freedoms of a teacher are not necessarily affected by the right of the school board to retain only those teachers who adequately discharge their teaching responsibilities and do not disrupt the efficient operation of the school. To the extent that this is a restriction of the freedom of a teacher, it is only incidental to the exercise of the school board's duty to maintain good schools."

Similarly, in *Parker* v. *Board of Edn. of Prince George County, Md.,* 237 F.Supp. 222, 229 (D.C. Md. 1965), *aff'd* 348 F.2d 464, *cert. denied* 382 U.S. 1030, *reh. den.* 383 U.S. 939, the court noted that the first amendment rights of a teacher are not absolute:

> "Where the abandonment of the abstract right of free speech results from government action taken for the protection of other substantial public rights, no constitutional deprivation will be found to exist." *American Communications Ass'n, CIO* v. *Douds,* 339 U.S. 382 (1950).

The state legislature has given the Mt. Healthy Board broad discretion to hire faculty. The Mt. Healthy Board members repeatedly testified that their decision was based on several incidents which conveyed to them the fact that Doyle had failed to demonstrate the maturity necessary to make a good teacher. In coming to that decision the Board acted within the lawful limits of its discretion. Doyle's behavior had disrupted the good operations of the school. Under *Pickering,* the Board is entitled to judgment in its favor.

b. The federal courts have not uniformly held that the presence of one constitutionally impermissible factor invalidates a school board's employment decision.

Although the Sixth Circuit Court of Appeals presumed and Respondent cited several cases as authority for the proposition that a non-renewal is constitutionally impermissible even if the teacher's exercise of First Amendment rights was only partially a factor in the non-renewal, no prior court has required a reinstatement unless the constitutionally impermissible reason played a *substantial* part in the non-renewal. *Gieringer* v. *Center School Dist. No. 58,* 477 F.2d 1164 (8th Cir. 1973); *Lusk* v. *Estes,* 361 F.Supp. 653 (N.D. Tex. 1973). In *Gray* v. *Union County Intermediate Education Dist.,* 520 F.2d 803 (9th Cir. 1975), *Sinard* v. *Board of Education,* 473 F.2d 988 (2d Cir. 1973), *Cook County Teachers Union Local 1600 AFT* v. *Boyd,* 456 F.2d 882 (7th Cir. 1971), *cert. den.* 409 U.S. 848, *reh. den.* 414 U.S. 883 (1973), and *Fluker* v. *Alabama State*

Board of Education, 441 F.2d 201 (5th Cir. 1971), courts upheld the Board's decision despite the teacher's claim.

Skehan v. *Bd. of Trustees of Bloomsburg State College,* 501 F.2d 31 (3d Cir. 1974), and *Roth* v. *Bd. of Regents,* 310 F.Supp. 972 (Wis. 1970), *aff'd* 446 F.2d 806 (7th Cir. 1971), *rev. and rem. on other grounds,* 408 U.S. 564, include dicta that non-renewal will not be affirmed if partially for impermissible reasons, but neither court holds that one impermissible factor contaminates the entire decision. In *Skehan,* the court remanded the case to determine inter alia whether the facts supported the teacher's claim (501 F.2d at 45), and in *Roth* the issue of whether the teacher was fired even in part for constitutionally protected activity was never decided because the court ruled instead on the procedural due process point (310 F. Supp. at 983).

Danse v. *Bates,* 369 F.Supp. 139 (N.D. Ky. 1973), clarifies the issue for there the court distinguished between three principals and one teacher who were demoted *solely* in retaliation for constitutionally protected activity (369 F.Supp. at 148) and two teachers who were not offered contracts at the same time and who had engaged in the same activity but for whom the court found other valid reasons for the Board's decision. Although the court reinstated four of the plaintiffs, the decision of the school board was affirmed in the case of the two teachers because the court found it justified by reasons unrelated to the First Amendment activities.

In *Callahan* v. *Superintendent of Edn. of Leske County, Miss.,* 505 F.2d 83, 513 F.2d 51 (5th Cir. 1975), *cert. denied* 11/4/75, the court upheld the non-renewal of a non-tenured superintendent whose employment was terminated because of community opposition, even though

some of the opposition was racially motivated by the superintendent's efforts to comply with desegregation orders. That case, like the present one, was tried on the basis of the First and Fourteenth Amendments and 42 USC § 1983. The constitutionally impermissible factor did not contaminate the Board's decision. The record in the instant case, as in *Callahan,* supplies ample acceptable reasons to warrant the Board's non-renewal decision; their decision should be upheld.

CONCLUSION

Jurisdiction in this case should never have been granted. Plaintiff did not have a claim of $10,000 to qualify under 28 U.S.C. § 1331 and jurisdiction under 42 U.S.C. § 1983 was not proper. The Supreme Court should consider this suit to resolve the inconsistency and confusion among the lower courts about the application of 42 U.S.C. § 1983 to local public school boards.

With the increasing involvement of courts in review of the decision making procedures of school boards the issue of Eleventh Amendment immunity for schools has taken on a new urgency. A uniform rule is badly needed so that the agencies committed to the education of our children can take the precautions necessary to protect their scarce dollars from the type of claim alleged herein. At the very least, the facts of this case do not merit overturning the Ohio rule of protection from monetary claims.

Even assuming jurisdiction and no immunity, assumptions we do not concede, the decision of the Court of Appeals should be reversed because the Mt. Healthy City School Board did not violate Fred Doyle's First Amendment rights. Under the law Doyle was not entitled to reasons for his dismissal. The reasons given in testimony

by the Board members indicate that their decision was not in retaliation for the telephone call to the radio station. Courts should not interfere in the daily operation of the schools absent a showing of a constitutional violation.

Respectfully submitted,

PHILIP S. OLINGER
Attorney for Appellant

APPENDIX

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

Case No. 8044

FRED DOYLE,
1965 Connecticut Avenue, Cincinnati, Ohio
Plaintiff,

v.

MT. HEALTHY CITY SCHOOL DISTRICT BOARD OF EDUCATION; REX RALPH, Individually and as Superintendent; WILLIAM C. LITTMEIER; WILLIAM M. MORRIS; MRS. MARCIA HAUPP and MRS. VIVIAN CLARK,
Defendants.

FINDINGS AND CONCLUSIONS

(Filed September 9, 1974)

Basically this is a civil rights case (42 U.S.C. § 1983) involving the failure to renew the contract of the plaintiff, a nontenured teacher, in the spring of 1971. It is claimed, and the claim appears well founded, that this Court has jurisdiction under 28 U.S.C. § 1331 (federal question) since it appears that the plaintiff's salary during the subsequent school year (1971-72), and entirely apart from tenure, would have amounted to more than $10,000.00.

The plaintiff graduated from Miami University in Oxford, Ohio, with a bachelor of science in education in 1966. He subsequently acquired an MA in 1968. His basic certification was as a professional high school teacher. In 1966 and at age 24, he was employed by the defendant Mt. Healthy Board of Education as a business teacher in the Mt. Healthy, Ohio school system and specifically in the high school.

The plaintiff taught in the high school until the summer of 1971. The years 1966-67, 1967-68, and 1968-69 involved one-year contracts. In 1969 he was tendered and accepted a two-year contract covering the years 1969-70 and 1970-71. Up to that point he had no tenure under Ohio law.

In 1969, at the end of the school year, he was "commended for an excellent rating as a teacher" by the Mt. Healthy Board, that action involving a merit raise.

In April of 1971 he was notified that the Mt. Healthy Board would not extend to him a contract for the coming year — 1971-72.

The decision of the Board with respect to that year, i.e., 1971-72, to tender or not to tender the plaintiff a further contract for another year or longer involved greater significance than the same decision in the previous year or years. The extension of a contract and his acceptance would have changed his status from a nontenured to a tenured teacher, such being the year of tenure acquisition under Ohio law.

This case was filed in July, 1971, against the Mt. Healthy Board as such; the five then (1971) members of that Board as such and individually (two are no longer on the Board); and the then Superintendent of the school system (who has since retired).

The plaintiff claims that the failure to renew and/or extend him tenure in 1971 was due to his exercise of his federal right of free speech and assembly and/or as a punishment therefor. The defendants claim that it was due to the plaintiff's "immaturity" and lack of "tact." It is noted that such factors are included as important in the standard Ohio forms used in evaluating student teaching.

The plaintiff seeks a reinstatement injunction with a back-pay award and attorney's fees.

During the plaintiff's first three school years as a teacher at Mt. Healthy his performance was, to say the least, quite satisfactory. Over the entire span of 1961-71, (a) there is no hint of criticism of his private or personal activities; (b) it is conceded that he was and is a good teacher in the sense that he knew his subject and had the ability to teach it effectively in the classroom; and (c) his school related extra-curricular activity was good. He, for instance, founded and conducted a new club activity called "Future Businessment of America Club" for the students, which all concerned compliment. He managed, from a faculty point of view, the school paper toward the end of his service, and turned its operation from red to black. He was prominently and favorably associated with Boy Scout and Explorer activities.

Events which brought about this case occurred basically in the 1969-71 period.

For some years prior to 1969 there had been an organization of the employees of the Mt. Healthy School System called the Mt. Healthy Education Association. Its members included what in an industrial field would have been described as both labor and management. In other words, active teachers were eligible as well as principals, assistant principals, school superintendents, etc. Its activities were

accented in the social field and in the general educational field. It had not overly concerned itself with the problems of teachers qua teachers vs. board, etc. qua employer. In 1969, the plaintiff was elected as president of this organization to serve for the 1969-70 term. Shortly after his election, the Education Association was reorganized. It adopted a new constitution which limited its membership to "full-time class room teachers, counsellors and librarians." More importantly, it devoted itself actively to the collective problems of the teachers vis-a-vis the superintendent and board, and, either late in 1969 or early in 1970, the Association as such (now named the Mt. Healthy Teachers Association) listed nine items of collective interest with respect to which its representatives desired to negotiate with the board as such. The items are the ones that might be expected and need not be listed. Typically the Association, under the leadership of the plaintiff, made some comparative studies of the salaries of surrounding school boards and studied further the records of the board with respect to the abilities of the board.

There were two general areas of procedural rubbing. The first might be described in this manner: The representatives of the Teachers Association wished to negotiate on all nine items and directly with the board and not through the superintendent. The board was willing to talk about six, but refused to talk about three as non-negotiable. Secondly, the board stood on the proposition that the negotiations had to be carried out by the superintendent directly. There existed a sort of impasse and the overall situation in early 1970 could be aptly described as tense. The three leaders of the Association included the plaintiff and two other teachers named Henn and Jewett. For instance, in early February, 1970, the board found it necessary to circulate to all teachers a reply to Doyle as

President made in response to the "numerous complaints against the board and administration" filed by the plaintiff and likewise circularized to the membership. On February 18 of that year a lengthy list or recommendations for amendments to the board policy was filed over the signature of the plaintiff. At this point the membership of the teachers association included approximately 250 out of 290 eligible.

On the 19th, again over Doyle's signature, there was delivered to the board a communication which in effect indicated that if the board did not begin good faith negotiations on the nine points by February 26, a strike vote would be considered.

This case from now on deals with a number of specific instances as relevant to the 1971 board decision not to renew.

We will adopt the names used during the trial, and the first would be called the "Hinkle" incident. On Friday, February 20, 1970, a fellow teacher named Hinkle came to the plaintiff's office. Hinkle protested some action or claim of the plaintiff and there was a verbal argument and eventually Hinkle slapped the plaintiff. The plaintiff went to the principal's office and the principal got Hinkle and brought him to his office and there was a discussion which resulted in Hinkle apologizing and the principal recommending to the plaintiff that he accept the apology and forget it. The plaintiff refused to "accept the apology." This in effect, at least in the context of this case, apparently meant that the plaintiff was not satisfied with that disposition and would want to appeal that disposition first to the superintendent and secondly, if not successful there, to the board. Subsequently the parties met with the superintendent, with the same result. At the start of the

school day on the following Monday, the 23rd, and at the opening of school, the participants (the plaintiff and Hinkle) were suspended and sent home. The result was a teachers walk-out at the high school, which for practical purposes shut down the school and sent home the pupils for that day. This was followed by a school board meeting and, as a result of all this, both suspensions were lifted with no prejudice to the record in respect of either participant; the board agreed to negotiate on all nine points; the board agreed to and did employ an attorney, and a specialist in such matters, to represent it in negotiations; negotiations on behalf of the board were to be carried out through the superintendent and this lawyer; the negotiations with the teachers were to be carried on by a team represented by Doyle and the other two teacher leaders heretofore named. Evidently this resulted eventually in the negotiation of mutually agreed upon solutions, although whatever solution was with respect to these demands is not a part of this record. The above is described in this record as the Hinkle incident and it is pointed to by the plaintiff as indicative of the real reason for his eventual disposition, and is pointed to by the defendants as evidencing a lack of "tact" — presumptively on the the theory that the recommendations of the higher authorities should have been accepted and would have been by a tactful person.

The remaining incidents which we will outline, without any particular dating, occurred at or about the same time and between that time and April of 1971 when the board determined not to renew, and the remaining incidents are relied on by the defendants as demonstrating the reason for the failure to renew. They are called: "gesture," "spaghetti," "radio," "SOB's," "direct dealing."

We will take the last one first. At one point during

the 1970 negotiations, the plaintiff prevailed on one of the board members to arrange for a meeting between the board as such, although informally, and the teachers association negotiating team. At the appointed time the board members walked into the appointed place and, instead of finding the team, were confronted by most of the membership of the association. Bearing in mind that one of the points of difference between the board and the association involved just this sort of thing, it was certainly a "tactless" thing to do and caused rather unfavorable reaction from, particularly, the board member who had negotiated the meeting. That particular board member happens to have a long record of AFL/CIO union membership in his ordinary full-time occupation.

Doyle objected to the amount of food, to-wit spaghetti (hence, the name), that had been served to him in the cafeteria. Technically, he had nothing to do supervisory-wise with any of the cafeteria help. The objection should have been lodged with the principal. However, it was not, and it led to a rather foolish argument during cafeteria hours between Doyle and the cafeteria help as a part of which Doyle found occasion to call the help "stupid." This resulted in a complaint by the kitchen authority to higher authority, a confession by Doyle that he was wrong and an appearance by him in the cafeteria for apology purposes, which resulted in another go-round.

The SOB incident: In connection with a disciplinary complaint, Doyle, in the presence of an assistant principal and three or four involved students, referred to the students as "sons of bitches." The appellation was heard by both the principal and the students involved. That, of course, does demonstrate, in any language, a lack of maturity and tact.

The "gesture" incident is described in this record in a file memorandum of the assistant principal copied below.

> "Earlier in the year Mr. Doyle and four girl students had a little problem over the procedure that Mr. Doyle follows in supervising the cafeteria during lunch time.
>
> "Because of the fact that the snack bar is needed fifth period for a study hall, Mr. Doyle tries to start getting things cleared up around 12:15. The girls felt this was unfair, and they began to make an obvious effort to slow things up as much as possible. After a couple days of this, Mr. Doyle confronted them on the situation and a heated verbal dispute ensued. During or at the end of the argument, Mr. Doyle gave the girls the two-fingered gesture and, of course, the girls responded with their own gesture.
>
> "Mr. Doyle came to me and told me of the problem and the names of the four girls involved. He told me that he knew he had over-reacted and all he wanted to do was talk to the girls in order to get things straightened out.
>
> "I called the girls to the office and Mr. Doyle did most of the talking. I only got involved when one girl began acting very rude and started getting disrespectful. During the course of the conversation, Mr. Doyle apologized for his actions and conveyed the reasons for the procedure followed in supervising the cafeteria.
>
> "Certainly, this type of action, provoked or unprovoked, is not the type of action that should be forthcoming from a mature adult.
>
> /s/ Walter Peters
> Walter Peters
> Assistant Principal"

The above needs this explanation. In what might be called the pig Latin of today, or perhaps more accurately high school sign language, the two-fingered gesture means

"bull —" and the one-fingered gesture means "screw you." This incident would undoubtedly give a school board pause in connection with the extension of a tenure contract.

The final incident is referred to as the "radio" incident. In February of 1971, the principal at the high school circulated to the various teachers a memorandum on teacher dress and appearance. It was a rather mild page and a half affair. The plaintiff promptly called it into a radio station in Cincinnati with which he had some established connection, which radio station promptly repeated it in substance on the air, with the comment that might be expected from a radio station specializing in acquiring young listeners. The memorandum had been prompted in the first place by the relationship between teachers' dress and public support in bond issues and that relationship is established in this record. The principal, who had an idea that publication was at Doyle's behest, called him on the carpet for it. Doyle apologized, agreeing with the principal's point that Doyle should have made some effort to give any criticism he had of it to the proper authority before going to any outside publication. Once again the incident is related to tact and maturity and all concerned must recognize that Doyle's contact with the radio station was a basic First Amendment right. On the other hand, there are tactful ways of exercising rights, or untactful ways; or, if one would prefer, there are mature ways and immature ways, and in any sort of organization immediate appeal to the outside is recognized as not desirable until its necessity is established.

Each year in the spring teachers are evaluated by the superintendent for purposes of the tender of then optional contracts in particular. The superintendent then reports to the board his recommendations. This was done in March of 1971 and specifically on March 17 the recom-

mendation with respect to the teachers involved were made to the board. With respect to Doyle the recommendation was that the board not enter into a new contract. The same recommendation was made with respect to four other high school teachers and five elementary school teachers, and the recommendation in each instance was adopted formally by the board. The superintendent and each of the four board members, who testified in this case, testified that his or her vote or recommendation was not based in any way on any activity of the plaintiff in the free speech or assemblage field. The board members, of course, testified, in addition, that they relied on the recommendation of the superintendent.

On April 2, 1971, the plaintiff was notified that the school would not extend to him a contract during the coming year. He asked for a statement of reasons and on the 15th he received a statement which cited "lack of tact" and gave as two examples the radio incident and the gesture incident.

It is important to note that while several other members of the teachers association, notably the ones above named, engaged in extensive activity along with the plaintiff with at least one of them being vulnerable from a non-tenure position, but nonetheless the other union-activity teachers were contract renewed. This is somewhat of an indication of a reason in the plaintiff's case. In addition, while it is apparent that the members of the association went up in arms in February of 1970 at the suspension, there appears to have been no reaction at all by the association to the failure to renew the contract in April of 1971. It is true that at the former time the plaintiff was president of the association, which he was not at the latter time; on the other hand, he was a member of the executive committee at the latter time.

Subsequently, the plaintiff secured employment at the Miami Trace Local School District in Washington Court House, Ohio, and for the three school years — 1971, 1972, and 1973 — has received wages of $29,127.00. If he had been employed through the same years with the Mt. Healthy Board, he would have received an aggregate of $34,285.00 — a monetary damage differential amounting to approximately $5,150.00 for the period involved.

The plaintiff's reasonable attorney's fees, including reasonable expenses, to date for the prosecution of this case amount to $6,343.16. Of that amount $2,539.98 has been paid to the plaintiff's counsel by a statewide teachers association of which the plaintiff is and has been a member.

The ultimate question of fact in this, as well as any case like this, is "whether the failure of the board to renew plaintiff's contract was because of his exercise of First Amendment rights." See *George* v. *Conneaut*, 472 F. 2d 132 (6th Cir. 1972). The plaintiff, of course, has the burden of proving just that by a preponderance. See *Fluker* v. *Alabama*, 441 F. 2d 201 (5th Cir. 1970).

Under Ohio law (Chapter 3313 Ohio Revised Code) the school board is a subdivision of the state and the board members are state officers, as is the school superintendent. Board members are selected at popular elections and for all practical purposes serve without pay. The superintendent is required to report on the teaching staff annually and is specifically required (3319.11) to recommend annually to the board in respect of the future of teachers not already tenured. A broad discretion in the employment of teachers (non-tenured) is devolved upon the Board and Superintendent. In fact, a teacher not under continuance contract (tenure) may be denied reemployment for *no* reason at all. Generally the situation lends itself to a "state officer" or "broad discretion" de-

scription — whether from the point of view of the board or superintendent.

No member of the Board acted with any malice. That is true of the Superintendent. In fact, as this Court sees it and finds, both the Board and the Superintendent were faced with a situation in which there did exist in fact reason — (see *James* v. *West Virginia,* 322 F. Supp. 217 (S.D. W. Va. 1971, aff. 448 F. 2d 785 (4th Cir. 1971)) independent of any First Amendment rights or exercise thereof, to not extend tenure. It is important to note that the new contract involved "tenure" and the record must be viewed with that in mind (i.e., prior recommendations and evaluation lose some force a/c not made in a similar situation). As we see it and find as a fact, the Superintendent and the Board were faced with a situation in which there were a number of moving causes, some permissible and some not permissible. The action based thereon, whatever its legal results, cannot be described as arbitrary or retaliatory or malicious or marked by bad faith.

Conclusions

1) If a non-permissible reason, e.g., exercise of First Amendment rights, played a substantial part in the decision not to renew — even in the face of other permissible grounds — the decision may not stand. See *Shehan* v. *Board,* — F. 2d — (3rd Cir. 1974) and cases therein cited; *Lusk* v. *Estes,* 361 F. Supp. 653 (Texas, 1973).

2) A non-permissible reason did play a substantial part. That is clear from the letter of the Superintendent immediately following the Board's decision, which stated two reasons — the one, the conversation with the radio station clearly protected by the First Amend-

ment. A court may not engage in any limitation of First Amendment rights based on "tact" — that is not to say that the "tactfulness" is irrelevant to other issues in this case.

3) The plaintiff is entitled to a reinstatement with back pay and, upon acceptance of reinstatement at the earliest permissible time, will be entitled to tenure on the same basis as if he had been employed by the defendant Board during the interim. There are some problems connected with this by virtue of the plaintiff's present contract and those problems will be left to the parties to work out in the first instance.

4) It seems settled enough that the remedy, if any, in addition to reinstatement and back pay (vs. the Board) is left to the Court to fashion. The only guideline seems to be "suitability" in the particular case. This is true whether this case be regarded as a 1983 one or a 1331.[1]

5) There should be an award against the Board as such for attorney's fees in the amount found reasonable — $6,343.16 — this for the reason that the public has an interest in having its state-related institutions act in compliance wih the Federal Constitution and, in a case such as this, plaintiff's counsel is in effect a private Attorney General. See *Stolberg* v. *Board,* 274 F. 2d 485 (2nd Cir. 1973); *Donahue* v. *Staunton,* 471 F. 2d 475, 482 (7th Cir. 1972); *Newman* v. *Piggie Park,* 390 U. S. 400 (1968). This should be without ref-

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[1] The awarding of attorney's fees in § 1983 actions rests in the sound discretion of the district court judge. *Hill* v. *Franklin County Board of Education,* 390 F. 2d 583 (6th Cir. 1968).

When the statute is silent as to remedy, federal courts have a duty to fashion an effective remedy to carry out the purpose of the statute. *J. I. Case Co.* v. *Borak,* 377 U. S. 426 (1964).

erence to any payments to plaintiff's counsel from private sources, and without deduction.

6) This is *not* a case for punitive damage. The Board acted here in a rather untrod field (several causes, one impermissible). This Court, while concluding as it has, recognizes a great deal of doubt and may be wrong. In such a situation it would be inequitable to award "punitive" damage.

7) The Board members, as individuals, are dismissed. There will be no damage award against them by this Court. The same is true of the Superintendent. Each was acting as a State officer in a field necessarily involving the broadest discretionary functions. As pointed out above, the State law contains *no* guidelines to govern a board or superintendent in solving the problem of whether tenure should or should not be tendered a given teacher. Any court should be careful in constituting itself a judge of "cause" in such a field — mainly because the expertise in that field rests with the school authorities. The law recognizes a "conditional privilege" in such matters and each member of the Board and the Superintendent enjoyed it. See *Safeguard* v. *Miller,* 472 F. 2d 732 (3rd Cir. 1973); *Lasher* v. *Shafer,* 460 F. 2d 343 (3rd Cir. 1972). This conditional privilege — or, if one would prefer, governmental immunity — protects from claims for attorney's fees, damages and punitive damages, at least in cases not involving flagrancy. This is far from a flagrant case.

8) Costs are to be assessed against the defendant Board.

9) This Court has not stated any conclusion on the possible Monroe-Kenosha problem in this case since it seems that the case is properly here as a § 1331

case, as well as a § 1983 one. Somewhat similarly, no conclusions relative to a possible Eleventh Amendment problem (see *Jordan* v. *Gilligan,* — F. 2d — (6th Cir. 1974)) are stated since the parties seem to concede that O.R.C. § 3313.17 (the Board of each District shall be a body politic and corporate, and, as such, capable of suing and being sued, etc.) provides the necessary waiver.

10) A decree and judgment consistent herewith may be prepared and settled and presented.

/s/ TIMOTHY S. HOGAN
United States District Judge

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

Case No. 8044

FRED DOYLE,
1965 Connecticut Avenue, Cincinnati, Ohio,
Plaintiff,

v.

MT. HEALTHY CITY SCHOOL DISTRICT BOARD OF EDUCATION, REX RALPH, Individually and as Superintendent, WILLIAM C. LITTMEIER; WILLIAM M. MORRIS; MRS. MARCIA HAUPP and MRS. VIVIAN CLARK,
Defendants.

JUDGMENT ENTRY

(Filed October 11, 1974)

This action came on for trial before the Court, the Honorable Timothy J. Hogan, (sic) United States District Judge, presiding, the issues having been duly tried to the Court and the Court having entered its Findings and Conclusions on September 9, 1974:

IT IS ORDERED, ADJUDGED AND DECREED that judgment is rendered in favor of Plaintiff against the Defendant, Mt. Healthy School Board of Education and it is ordered to reinstate Plaintiff to employment and to grant him a continuing contract as a teacher; that the Mt. Healhy City School District Board of Education pay to Plaintiff the

sum of $5,158.00 as damages and the additional sum of $6,343.16 as attorney fees.

Judgment is hereby and herewith rendered in favor of Defendants Rex Ralph, William C. Littmeier, Charles Muller, William M. Morris, Marcia Haupp and Vivian Clark, and against the Plaintiff as to any and all claims asserted by the Plaintiff against these said Defendants.

Costs are to be assessed against the Defendant, Mt. Healthy City School District Board of Education.

/s/ TIMOTHY S. HOGAN
U. S. District Judge

APPROVED:

/s/ JONAS B. KATZ
Jonas B. Katz and Anthony P. Sgambati II
Attorneys for Plaintiff

/s/ JOHN C. BURKHOLDER
John C. Burkholder
Attorney for Board of Education and Individual Board Members

/s/ JAMES L. O'CONNELL
James L. O'Connell
Attorney for Rex Ralph

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

NO. 75-1382

FRED DOYLE,
Plaintiff-Appellee,

v.

MT. HEALTHY CITY SCHOOL DISTRICT
BOARD OF EDUCATION,
Defendant-Appellant.

ORDER

(Filed December 10, 1975)

Before: WEICK, PECK, MILLER, Circuit Judges.

This appeal was perfected from a judgment of the district court ordering plaintiff-appellee reinstated in his position under a teaching employment contract and awarding compensatory damages and attorneys fees. Being fully advised in the premises, the Court concludes that substantial evidence in the record supports the finding of the district court to the effect that appellant's action in refusing to renew appellee's contract was motivated at least in part by his action in informing a local radio station of an "appropriate dress code" suggested for teachers, and that the district court did not err in concluding that the refusal to renew the contract was based on a constitutionally impermissible reason. It is further determined that the compensatory damages awarded to appellee were properly

computed but that the intervening decision in *Alyeska* v. *Wilderness Society*, —— U.S. ——, 95 S. Ct. 1612 (1975), renders the allowance of attorneys fees inappropriate. Accordingly,

IT IS ORDERED that to the extent the judgment of the district court ordered the reinstatement of the plaintiff-appellee and the award to him of compensatory damages, it be and hereby is affirmed; it is further ORDERED, however, that the award of attorneys fees be and it hereby is vacated and set aside.

ENTERED BY ORDER OF THE COURT

/s/ JOHN P. HEHMAN
Clerk

STATUTES

OHIO REVISED CODE

2743.01 Definitions

As used in Chapter 2743. of the Revised Code:

(A) "State" means the state of Ohio, including, without limitation, its departments, boards, offices, commissions, agencies, institutions, and other instrumentalities. It does not include political subdivisions.

(B) "Political subdivisions" means municipal corporations, townships, villages, counties, school districts, and all other bodies corporate and politic responsible for governmental activities only in geographic areas smaller than that of the state to which the sovereign immunity of the state attaches.

• • •

2743.02 Waiver of state's immunity; claims reduced by collateral recovery

(A) The state hereby waives its immunity from liability and consents to be sued, and have its liability determined, in the court of claims in this chapter in accordance with the same rules of law applicable to suits between private parties, subject to the limitations set forth in this chapter. To the extent that the state has previously consented to be sued, this chapter has no applicability.

(B) Awards against the state shall be reduced by the aggregate of insurance proceeds, disability award, or other collateral recovery by the claimant.

• • •

3313.17 (4834). Corporate powers of the board.

The board of education of each school district shall be a body politic and corporate, and, as such, capable of

suing and being sued, contracting and being contracted with, acquiring, holding, possessing, and disposing of real and personal property, and taking and holding in trust for the use and benefit of such district, any grant or devise of land and any donation or bequest of money or other personal property.

• • •

3313.203 Liability insurance for board of education members

The board of education of any school district may purchase from an insurance company licensed to do business in this state, a policy or policies of insurance insuring members of boards of education against liability on account of damages or injury to persons and property resulting from any act or omission of such member in his official capacity as a member of the board of education or resulting solely out of his membership thereon. Whenever the board considers it necessary to procure such insurance, it shall adopt a resolution setting forth the amount of the insurance to be purchased, the necessity thereof, and a statement of the estimated premium as quoted in writing by not less than two insurance companies if more than one company offers such insurance for sale to the board. Upon the adoption of such resolution, the board may purchase insurance from the insurance company submitting the lowest and best quotation. The premiums for such insurance shall be paid out of the general fund.

• • •

3319.11 Continuing service status and contract; limited contract; failure of board or superintendent to act.

Teachers eligible for continuing service status in any school district shall be those teachers qualified as to certification, who within the last five years have taught for

at least three years in the district, and those teachers who, having attained continuing contract status elsewhere, have served two years in the district, but the board of education, upon the recommendation of the superintendent of schools, may at the time of employment or at any time within such two-year period, declare any of the latter teachers eligible.

Upon the recommendation of the superintendent that a teacher eligible for continuing service status be re-employed, a continuing contract shall be entered into between the board and such teacher unless the board by a three-fourths vote of its full membership rejects the recommendation of the superintendent. The superintendent may recommend re-employment of such teacher, if continuing service status has not previously been attained elsewhere, under a limited contract for not to exceed two years, provided that written notice of the intention to make such recommendaion has been given to the teacher with reasons directed at the professional improvement of the teacher on or before the thirtieth day of April, and provided that written notice from the board of education of its action on the superintendent's recommendation has been given to the teacher on or before the thirtieth day of April, but upon subsequent reemployment only a continuing contract may be entered into. If the board of education does not give such teacher written notice of its action on the superintendent's recommendation of a limited contract for not to exceed two years before the thirtieth day of April, such teacher is deemed reemployed under a continuing contract at the same salary plus any increment provided by the salary schedule. Such teacher is presumed to have accepted employment under such continuing contract unless he notifies the board in writing to the contrary on or before the first day of June, and a continuing contract shall be executed accordingly.

A teacher eligible for continuing contract status employed under an additional limited contract for not to exceed two years pursuant to written notice from the superintendent of his intention to make such recommendation, is, at the expiration of such limited contract, deemed reemployed under a continuing contract at the same salary plus any increment granted by the salary schedule, unless the employing board, acting on the superintendent's recommendation as to whether or not the teacher should be reemployed, gives such teacher written notice of its intention not to reemploy him on or before the thirtieth day of April. Such teacher is presumed to have accepted employment under such continuing contract unless he notifies the board in writing to the contrary on or before the first day of June, and a continuing contract shall be executed accordingly.

A limited contract may be entered into by each board with each teacher who has not been in the employ of the board for at last three years and shall be entered into, regardless of length of previous employment, with each teacher employed by the board who holds a provisional or temporary certificate.

Any teacher employed under a limited contract, and not eligible to be considered for a continuing contract, is, at the expiration of such limited contract, deemed reemployed under the provisions of this section at the same salary plus any increment provided by the salary schedule unless the employing board, acting on the superintendent's recommendation as to whether or not the teacher should be reemployed, gives such teacher written notice of its intention not to reemploy him on or before the thirtieth day of April. Such teacher is presumed to have accepted such employment unless he notifies the board in writing to the contrary on or before the first day of June, and a

written contract for the succeeding school year shall be executed accordingly. The failure of the parties to execute a written contract shall not void the automatic reemployment of such teacher.

The failure of a superintendent of schools to make a recommendation to the board of education under any of the conditions set forth in this section, or the failure of the board of education to give such teacher a written notice pursuant to this section shall not prejudice or prevent a teacher from being deemed reemployed under either a limited or continuing contract as the case may be under the provisions of this section. (129 v 1206. Eff. 10-17-61. 128 v 123)

APPENDIX

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

No. 75-1278

MT. HEALTHY CITY SCHOOL DISTRICT
BOARD OF EDUCATION,
Petitioner.

vs.

FRED DOYLE,
Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Petition For Certiorari Filed March 9, 1976

Certiorari Granted April 19, 1976

TABLE OF CONTENTS

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

FRED DOYLE,
1965 Connecticut Avenue,
Cincinnati, Ohio 45224,

PLAINTIFF,

vs.

MT. HEALTHY CITY SCHOOL DISTRICT
BOARD OF EDUCATION MT. HEALTHY
Cincinnati, Ohio, 45231,

REX RALPH, Individually and as Superintendent of Mt. Healthy City School District, Mt. Healthy Cincinnati, Ohio 45231,

WILLIAM C. LITTMEIER, Individually and as a member of the Board of Education of the Mt. Healthy City School District, 598 Kinney Avenue, Cincinnati, Ohio 45231,

CHARLES MULLER, Individually and as a member of the Board of Education of the Mt. Healthy City School District, 1846 Lakeknoll Drive, Cincinnati, Ohio,

WILLIAM M. MORRIS, Individually and as a member of the Board of Education of the Mt. Healthy City School District, 2073 Adams Road, Cincinnati, Ohio 45231,

MRS. MARCIA HAUPT, Individually and as a member of the Board of Education of the Mt. Healthy City School District, 1977 Adams Road, Cincinnati, Ohio 45231,

MRS. VIVIAN CLARK, Individually and as a member of the Board of Education of the Mt. Healthy City School District, 9132 Ranchill. Cincinnati, Ohio 45231,

DEFENDANTS.

RELEVANT DOCKET ENTRIES

7/13/71	COMPLAINT, filed
7/29/71	ANSWER of all defts filed.
10/14/71	Pretrial Conf. Order No. 1 Magistrate Perlman, Defts. to furnish certain materials by 11/1/71, — Pltf. has to 12/15/71 to examine & furnish Statute report, Question of Consolidation of cases to be determined at final PT Issued Counsel by Magistrate
4/25/73	MOT. for SUMM. J. filed by Deft. Rex Ralph
11/15/73	ORDER entered by J. Hogan denying deft, Rex Ralph's Mot. for Summ. J. copies mailed to counsel.
6/20/74	PT Statement of Mt. Healthy City Bd. of Ed., Wm. C. Lippmeier, Chas. Muller, Wm. N. Norris, Marcia Haupt & Vivian Clark, filed. [See 8043C]
6/24/74	PT Statement of Deft. Rex Ralph filed.
7/ 1/74	AMENDED PT Statement filed by Deft. in

	Letter form dated 6/27/74. (See 8043-8044-8045)
7/22/74	Cases called for Trial to the Court by J. Hogan — Statement by Court. Statement by Counsel that cases #8043 & #8045 will be dismissed — Trial will proceed in case #8044. Opening arguments by Counsel. Pltf's testimony begun but not concluded. Case cont'd to Tuesday, July 23, 1974 at 9:30 A.M.
7/23/74	Case called for Trial to the Court by J. Hogan — Cont'd fm 7/22/74 — Pltf's testimony cont'd but not concluded. Case cont'd to Wednesday, July 24, 1974 at 9:30 A.M.
7/24/74	Case called for Trial to the Court by J. Hogan — Case cont'd fm 7/23/74 — Pltf's testimony cont'd & concluded. Pltf rests. All defts move the court for dismissal of Pltf's case. Court reserves ruling. Defts testimony begun & concluded. Deft. rest. Pltf's counsel to file entry setting out attny fees, etc. Briefs or Memos to be filed by August 14, 1974. Case submitted.
8/ 1/74	EXHIBITS filed by Court Reporter fm. trial of 7/22, 23 & 24/74, & placed in Vault.
9/ 9/74	FINDINGS & CONCLUSIONS, entered by J. Hogan. Both the Board & the Supt. acted w/o malice. They were faced w/a situation independent of First Amd. Rights to not extend tenure.

CONCLUSIONS:

1. If a non permissible reason, exercise of 1st Amd. Rights played a part in the decision not

to renew even in the face of other permissible grounds, the decision may not stand.

2. A non permissible reason did play a part — the Radio incident, protected by the 1st Amd.

3. Pltf. is entitled to reinstatement w/back pay, upon acceptance of reinstatment at the earliest time possible & will be entitled to tenure on the same basis as if he had been employed by the Bd. during the interim.

4. There is a guideline of suitability in this particular case.

5. An award against the Board in the sum $6,-343.16 for atty. fees is reasonable.

6. This is not a case for punitive damages.

7. The Board members as individuals are dismissed. There will be no damage award against them.

8. Cost are to be assessed against the deft. Board. A Decree & Judgment consistent herewith may be prepared, Settled and presented. Issued counsel.

10/11/74 JUDGMENT ENTRY entered by J. Hogan — It is ordered that judgment is rendered in favor of Pltf against Deft. Mt. Healthy School Bd. of Education & it is ordered to reinstate pltf. to employment & to grant him a continuing contract as a teacher; that Mt. Healthy City School District Bd of Education pay pltf. the sum of $5,158.00 as damages & the additional sum of $6,343.16 as attny fees. Judgment is rendered in favor of defts Rex Ralph, Wm.

C. Littmeier, Charles Muller, Wm. M. Morris, Marcia Haupt & Vivian Clark & against pltf. against said defts. Costs are assessed against the deft., Mt. Healthy City School District Bd. of Education. Issued Counsel.

11/ 1/74 NOTICE of Appeal by Mt. Healthy City School District Bd. of Education, filed by Deft. Issued Philip Olinger, & J. Katz, Esq.

1/27/75 EXTRACT OF PROCEEDINGS (Volume I — Pages 1-89 — July 22, 1974) filed by Court Reporter

1/27/75 TRANSCRIPT OF PROCEEDINGS (Volume II — Pages 90-279 — July 23, 1974) filed by Court Reporter

1/27/75 EXTRACT OF PROCEEDINGS (Volume III — Pages 280-542 — July 24, 1974) filed by Court Reporter.

12/10/75 Opinion, Sixth Circuit Court of Appeals

3/ 9/76 Petition for Writ of Certiorari docketed in Supreme Court.

RELEVANT PLEADINGS, CHARGE, FINDING OR OPINION

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO, WESTERN DIV.

[TITLE OMITTED]

COMPLAINT

(Filed July 13, 1971)

1. This is an action for injunctive relief and for damages. Jurisdiction over this cause is conferred by 42 U.S.C. § 1983; 28 U.S.C. § 1931, §1343 (3), and 1343 (4).

2. Plaintiff is a school teacher duly certified by the State of Ohio and qualified to teach General Business and Typing subjects in the public school systems of Ohio. Plaintiff has been employed by the Defendant School Board under annual contracts since September, 1966. The last contract was for the school years 1969-71.

3. Defendant Board of Education is the board with the statutory authority to conduct and administer the affairs of the Mt. Healthy City School District. Included in its responsibilities is the execution and administration of contracts of employment with teachers employed in the City School District.

4. Defendant Rex Ralph is the Superintendent of the Mt. Healthy City High School District, and is chief executive and administrative officer of the Defendant School Board. Defendant Ralph's duties include making recommendations to the Defendant Board of Education as to whether teachers shall be employed, and/or continued to be employed, by the Defendant Board of Education.

5. Plaintiff was the President of the Mt. Healthy Teachers Association during the school year 1969-1970, and was one of the principal negotiators and representatives of the Association in its professional negotiations with the Defendant Board of Education, and in the administration of the professional agreements reached with the Defendant Board of Education. While acting in these capacities, Plaintiff expressed to Defendants' teachers, and to the public through the news media, views in conflict with those held by Defendants.

6. On March 22, 1971, acting on the recommendation of Defendant Superintendent Ralph, the Defendant Board of Education decided not to renew Plaintiff's contract for teaching in the 1971-1972 year. The decision not to renew Plaintiff's contract was based on Plaintiff's membership in, and leadership of, the Mt. Healthy Teachers Association, his activities as the President of the Association, and his conduct and expression of opinions and views, as a principal negotiator and administrator for teacher members of the Association. The Defendants' decision not to rehire Plaintiff is in retaliation, and as punishment, for exercise of rights guaranteed to Plaintiff by the First and Fourteenth Amendment to the Constitution of the United States.

7. On April 2, 1971, Defendant notified Plaintiff that the Defendants would not extend to him a contract for teaching in the 1971-1972 school year and recited that the decision not to renew his employment was made at a regular meeing held March 22, 1971. No reasons were given for the decision not to renew Plaintiff's contract.

8. Upon receipt of the advice that his contract was not to be renewed, Plaintiff demanded the reasons for the decision not to review his contract and a hearing at which he could demonstrate that the decision not to renew his

employment was based upon constitutionally impermissible reasons.

9. The Defendants refused to reconsider their decision not to renew Plaintiff or to grant him the hearing he demanded. The refusal to grant Plaintiff the hearing is a violation of Plaintiff's right to due process of law, protected and guaranteed by the Fourteenth Amendment of the United States Constitution.

10. Defendants, acting under the color of State law, intentionally, deliberately, and knowingly punished Plaintiff for the exercise of rights protected by the First and Fourteenth Amendments and deprived Plaintiff of rights without due process of law, in contravention to the Fourteenth Amendment to the Constitution of the United States, and the guarantees of the Civil Rights Act of 1871, 42 U.S.C. § 1983, rendering Defendants liable to Plaintiff in law and equity.

11. The acts of Defendants, individually and in concert, were maliciously and intentionally designed to deprive Plaintiff of his employment as a teacher with the Defendant School Board, to expose him to public ridicule and scorn, and to injure his reputation and character as a professional educator.

12. The action of the Defendants has been arbitrary, capricious, and discriminatory, entitling Plaintiff to compensation for emotional distress and embarrassment suffered as a result of Defendants' malicious acts.

WHEREFORE, Plaintiff requests that the Court:

1. Issue an Order reinstating Plaintiff to his teaching position in the Mt. Healthy City School District with all of the employment rights and privileges he would have been entitled to if his contract had not been improperly terminated and non-renewed;

2. Issue an order prohibiting Defendants from terminating Plaintiff's employment without first giving him reasons for the non-renewal of his teaching contract and providing the Plaintiff with a hearing to determine the propriety of the Defendants' action in failing to continue Plaintiff's employment;

3. Issue an Order awarding Plaintiff damages in the sum of FIFTY THOUSAND ($50,000.00) DOLLARS, together with court costs and attorney's fees incurred in this proceeding.

4. Award such other and additional relief as the Court deems appropriate.

GREEN, SCHIAVONI, MURPHY & HAINES

By /s/ EUGENE GREEN
Eugene Green
Attorney for Plaintiff
602 Stambaugh Building
Youngstown, Ohio 44503

PRAECIPE

TO THE CLERK:

Please issue service of process and a copy of the Complaint to the U. S. Marshal for service upon the within named defendants.

Endorse thereon: "Action for damages under the Civil Rights Act, equitable relief, attorney's fees and court costs.".

GREEN, SCHIAVONI, MURPHY & HAINES

By /s/ EUGENE GREEN
Eugene Green
Attorney for Plaintiff
602 Stambaugh Building
Youngstown, Ohio 44503

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO, WESTERN DIV.

[TITLE OMITTED]

ANSWER OF MT. HEALTHY CITY BOARD OF EDUCATION, REX RALPH, WILLIAM C. LITTMEIER, CHARLES MULLER, WILLIAM M. MORRIS, MRS. MARCIA HAUPP AND MRS. VIVIAN CLARK

(Filed July 29, 1971)

1. Mt. Healthy Board of Education, William C. Littmeier, Charles Muller, William M. Morris, Mrs. Marcia Haupt, Mrs. Vivian Clark, and Rex Ralph admit that William C. Littmeier, William M. Morris, Mrs. Marcia Haupt, and Mrs. Vivian Clark are members of the Mt. Healthy City Board of Education and included among their duties is the employment of teachers; that Rex Ralph is the Superintendent of the Mt. Healthy City School District and that among his duties is to recommend to the Board of Education as to whether teachers shall be reemployed in the Mt. Healthy City School District; and that Charles Muller was a member of the Mt. Healthy City Board of Education until his resignation effective the 30th day of June, 1971.

2. Defendants admit that Plaintiff is a duly certified teacher and has been employed by the Defendant Board of Education for a period of five years in various teaching capacities; that Plaintiff was President of the Mt. Healthy Teachers Association and that he represented the Association in professional negotiations with the Defendant Board of Education; and that Plaintiff's most recent employment with the Board of Education was under a limited teaching

contract, which by its terms expired at the end of the 1970-1971 school term.

3. Defendants admit that the Board of Education declined to employ Plaintiff following the expiration of his former limited teaching contract.

4. Defendants deny each and every other allegation of the complaint not herein specifically admitted to be true.

FIRST DEFENSE

5. The complaint fails to state a claim against the Mt. Healthy City Board of Education, William C. Littmeier, Charles Muller, William M. Morris, Mrs. Marcia Haupt, Mrs. Vivian Clark, and Rex Ralph upon which relief can be granted.

SECOND DEFENSE

6. Defendants deny that the recommendation of the Superintendent for non-renewal of Plaintiff's limited teaching contract and the action of the Board in not renewing Plaintiff's limited teaching contract was prompted by Plaintiff's membership in and activities on behalf of the Mt. Healthy Teachers Association.

THIRD DEFENSE

7. Defendants state that the statutes of the State of Ohio govern the qualifications and employment of teachers, including provisions for not reemploying teachers on limited contracts.

8. Defendants state that the Board of Education acted upon the recommendation of the Superintendent that

Plaintiff's limited teaching contract not be renewed and gave Plaintiff notice of its intention not to renew Plaintiff's limited teaching contract before April 30, 1971, and that such procedure was in all respects in accordance with the applicable state law.

/s/ ROBERT T. BAKER
Robert T. Baker
Means, Bichimer & Burkholder Co., L.P.A., 40 South Third Street,
Columbus, Ohio 43215
Special Counsel for Mt. Healthy City Board of Education and Counsel for William C. Littmeier, Charles Muller, William M. Morris, Mrs. Marcia Haupt, Mrs. Vivian Clark and Rex Ralph

[CERTIFICATE OF SERVICE OMITTED]

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO, WESTERN DIV.

[TITLE OMITTED]

PRE-TRIAL STATEMENT OF MT. HEALTHY CITY BOARD OF EDUCATION, WILLIAM C. LIPPMEIER, CHARLES MULLER, WILLIAM M. MORRIS, MRS. MARCIA HAUPT, AND MRS. VIVIAN CLARK

(Filed June 20, 1974)

(a) Facts.

Plaintiffs are each non-tenured teachers previously employed by the Mt. Healthy Board of Education under limited (probationary) contracts of employment. In accordance with the applicable procedure for the non-reemployment of probationary teachers, each of the Plaintiffs was notified prior to April 30, 1971, of the Board of Education's intent not to reemploy each Plaintiff.

These complaints are filed under the Civil Rights Act alleging a violation of due process and First Amendment rights. Since the date these complaints were filed, the issue of alleged violation of due process has been now settled by the United States Supreme Court with the determination that the procedure of the Ohio Statute (i.e. notification prior to April 30, without a hearing or statement of reasons) is *not* violative of a probationary teacher's constitutional rights. The only issue remaining for determination in this case is whether the action of the Defendants in not reemploying these teachers was in retaliation or as punishment for their exercise of constitutionally protected First Amendment rights.

(b) Contested Issues of Facts.

The ultimate questions of fact, which are contested, are whether the decision of the Defendants in not reemploying Plaintiffs were in retaliation and as punishment for Plaintiff's exercise of constitutionally protected rights.

(c) Contested Issues of Law.

Now that the United States Supreme Court has ruled on the matter of due process there are no contested issues of law in the instant case. The Plaintiffs must sustain their burden of proof by showing that the real reason that they were not reemployed was in retaliation and as punishment for exercise of their constitutionally protected rights.

(d) Special Damages.

N/A

(e) Names and Addresses of Prospective Witnesses.

William C. Lippmeier
598 Kinney Avenue
Cincinnati, Ohio 45231

Charles Muller
1846 Lakeknoll Drive
Cincinnati, Ohio

William M. Morris
2073 Adams Road
Cincinnati, Ohio 45231

Mrs. Marcia Haupt
1977 Adams Road
Cincinnati, Ohio 45231

Mrs. Vivian Clark
9132 Ranchill
Cincinnati, Ohio 45231

Rex Ralph
459 Lyncroft Drive
Gahanna, Ohio 43230

Walter Peters
2425 Stoneypoint Drive
Cincinnati, Ohio 45231

James T. Stragand
2120 Adams Road
Cincinnati, Ohio 45231

Bert W. Barnes
2436 Stoneypoint Drive
Cincinnati, Ohio 45231

Clarence C. Warren
6407 Edwood Drive
Cincinnati, Ohio 45224

Cecil Roebuck
8549 Mockingbird Lane
Cincinnati, Ohio 45231

All Plaintiffs as on cross-examination

(f) Documents, Records and Exhibits.

1. The personnel files of each Plaintiff and all items contained in such file, including their employment contracts, evaluations, notations and records.
2. Minutes of Board of Education

(g) **Waiver of Defenses.**

Defendants do not waive any defenses.

/s/ JOHN C. BURKHOLDER
John C. Burkholder
MEANS, BICHIMER, BURKHOLDER & BAKER CO., L.P.A.
50 West Broad Street, Columbus, Ohio 43215
(614) 221-3135
Counsel for above listed Defendants

CERTIFICATE OF SERVICE

The undersigned certifies that on June 19, 1974, a copy of the above Pre-Trial Statement was served upon other counsel by mailing same addressed as follows:

Jonas B. Katz
Six East Fourth Street
Cincinnati, Ohio 45202

and

Eugene Green
Green, Schiavoni, Murphy and Haines
602 Stambaugh Building
Youngstown, Ohio

and

James L. O'Connell
Lindhorst and Dreidame
American Building
Central Parkway at Walnut
Cincinnati, Ohio 45202

/s/ JOHN C. BURKHOLDER
John C. Burkholder

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

FRED DOYLE,
1965 Connecticut Avenue,
Cincinnati, Ohio 45224,
PLAINTIFF,

vs.

MT. HEALTHY CITY SCHOOL DISTRICT BOARD OF EDUCATION MT. HEALTHY, et al.,
DEFENDANTS.

FINDINGS AND CONCLUSIONS

(Filed September 9, 1974)

Basically this is a civil rights case (42 U.S.C. § 1983) involving the failure to renew the contract of the plaintiff, a nontenured teacher, in the spring of 1971. It is claimed, and the claim appears well founded, that this Court has jurisdiction under 28 U.S.C. § 1331 (federal question) since it appears that the plaintiff's salary during the subsequent school year (1971-72), and entirely apart from tenure, would have amounted to more than $10,000.00.

The plaintiff graduated from Miami University in Oxford, Ohio, with a bachelor of science in education in 1966. He subsequently acquired an MA in 1968. His basic certification was as a professional high school teacher. In 1966 and at age 24, he was employed by the defendant Mt. Healthy Board of Education as a business teacher in the Mt. Healthy, Ohio school system and specifically in the high school.

The plaintiff taught in the high school until the summer of 1971. The years 1966-67, 1967-68, and 1968-69 involved one-year contracts. In 1969 he was tendered and accepted a two-year contract covering the years 1969-70 and 1970-71. Up to that point he had no tenure under Ohio law.

In 1969, at the end of the school year, he was "commended for an excellent rating as a teacher" by the Mt. Healthy Board, that action involving a merit raise.

In April of 1971 he was notified that the Mt. Healthy Board would not extend to him a contract for the coming year — 1971-72.

The decision of the Board with respect to that year, i.e., 1971-72, to tender or not to tender the plaintiff a further contract for another year or longer involved greater significance than the same decision in the previous year or years. The extension of a contract and his acceptance would have changed his status from a nontenured to a tenured teacher, such being the year of tenure acquisition under Ohio law.

This case was filed in July, 1971, against the Mt. Healthy Board as such; the five then (1971) members of that Board as such and individually (two are no longer on the Board); and the then Superintendent of the school system (who has since retired).

The plaintiff claims that the failure to renew and/or extend him tenure in 1971 was due to his exercise of his federal right of free speech and assembly and/or as a punishment therefor. The defendants claim that it was due to the plaintiff's "immaturity" and lack of "tact." It is noted that such factors are included as important in the standard Ohio forms used in evaluating student teaching.

The plaintiff seeks a reinstatement injunction with a back-pay award and attorney's fees.

During the plaintiff's first three school years as a teacher at Mt. Healthy his performance was, to say the least, quite satisfactory. Over the entire span of 1961-71, (a) there is no hint of criticism of his private or personal activities; (b) it is conceded that he was and is a good teacher in the sense that he knew his subject and had the ability to teach it effectively in the classroom; and (c) his school related extra-curricular activity was good. He, for instance, founded and conducted a new club activity called "Future Businessmen of America Club" for the students, which all concerned complimented. He managed, from a faculty point of view, the school paper toward the end of his service, and turned its operation from red to black. He was prominently and favorably associated with Boy Scout and Explorer activities.

Events which brought about this case occurred basically in the 1969-71 period.

For some years prior to 1969 there had been an organization of the employees of the Mt. Healthy School System called the Mt. Healthy Education Association. Its members included what in an industrial field would have been described as both labor and management. In other words, principals, school superintendents, etc. Its activities were accented in the social field and in the general educational field. It had not overly concerned itself with the problems of teachers qua teachers vs. board, etc. qua employer. In 1969, the plaintiff was elected as president of this organization to serve for the 1969-70 term. Shortly after his election, the Education Association was reorganized. It adopted a new constitution which limited its membership to "full-time class room teachers, counsellors and librari-

ans." More importantly, it devoted itself actively to the collective problems of the teachers vis-a-vis the superintendent and board, and, either late in 1969 or early in 1970, the Association as such (now named the Mt. Healthy Teachers Association) listed nine items of collective interest with respect to which its representatives desired to negotiate with the board as such. The items are the ones that might be expected and need not be listed. Typically the Association, under the leadership of the plaintiff, made some comparative studies of the salaries of surrounding school boards and studied further the records of the board with respect to the abilities of the board.

There were two general areas of procedural rubbing. The first might be described in this manner: The representatives of the Teachers Association wished to negotiate on all nine items and directly with the board and not through the superintendent. The board was willing to talk about six, but refused to talk about three as non-negotiable. Secondly, the board stood on the proposition that the negotiations had to be carried out by the superintendent directly. There existed a sort of impasse and the overall situation in early 1970 could be aptly described as tense. The three leaders of the Association included the plaintiff and two other teachers named Henn and Jewett. For instance, in early February, 1970, the board found it necessary to circulate to all teachers a reply to Doyle as President made in response to the "numerous complaints against the board and administration" filed by the plaintiff and likewise circularized to the membership. On February 18 of that year a lengthy list of recommendations for amendments to the board policy was filed over the signature of the plaintiff. At this point the membership of the teachers association included approximately 250 out of 290 eligible.

On the 19th, again over Doyle's signature, there was delivered to the board a communication which in effect indicated that if the board did not begin good faith negotiations on the nine points by February 26, a strike vote would be considered.

This case from now on deals with a number of specific instances as relevant to the 1971 board decision not to renew.

We will adopt the names used during the trial, and the first would be called the "Hinkle" incident. On Friday, February 20, 1970, a fellow teacher named Hinkle came to the plaintiff's office. Hinkle protested some action or claim of the plaintiff and there was a verbal argument and eventually Hinkle slapped the plaintiff. The plaintiff went to the principal's office and the principal got Hinkle and brought him to his office and there was a discussion which resulted in Hinkle apologizing and the principal recommending to the plaintiff that he accept the apology and forget it. The plaintiff refused to "accept the apology." This in effect, at least in the context of this case, apparently meant that the plaintiff was not satisfied with that disposition and would want to appeal that disposition first to the superintendent and secondly, if not successful there, to the board. Subsequently the parties met with the superintendent, with the same result. At the start of the school day on the following Monday, the 23rd, and at the opening of school, the participants (the plaintiff and Hinkle) were suspended and sent home. The result was a teachers walk-out at the high school, which for practical purposes shut down the school and sent home the pupils for that day. This was followed by a school board meeting and, as a result of all this, both suspensions were lifted with no prejudice to the record in respect of either participant; the board agreed to negotiate on all nine

points; the board agreed to and did employ an attorney, and a specialist in such matters, to represent it in negotiations; negotiations on behalf of the board were to be carried out through the superintendent and this lawyer; the negotiations with the teachers were to be carried on by a team represented by Doyle and the other two teacher leaders heretofore named. Evidently this resulted eventually in the negotiation of mutually agreed upon solutions, although whatever the solution was with respect to these demands is not a part of this record. The above is described in this record as the Hinkle incident and it is pointed to by the plaintiff as indicative of the real reason for his eventual disposition, and is pointed to by the defendants as evidencing a lack of "tact" — presumptively on the theory that the recommendations of the higher authorities should have been accepted and would have been by a tactful person.

The remaining incidents which we will outline, without any particular dating, occurred at or about the same time and between that time and April of 1971 when the board determined not to renew, and the remaining incidents are relied on by the defendants as demonstrating the reason for the failure to renew. They are called: "gesture," "spaghetti," "radio," "SOB's," "direct dealing."

We will take the last one first. At one point during the 1970 negotiations, the plaintiff prevailed on one of the board members to arrange for a meeting between the board as such, although informally, and the teachers association negotiating team. At the appointed time the board members walked into the appointed place and, instead of finding the team, were confronted by most of the membership of the association. Bearing in mind that one of the points of difference between the board and the association involved just this sort of thing, it was certainly

a "tactless" thing to do and caused rather unfavorable reaction from, particularly, the board member who had negotiated the meeting. That particular board member happens to have a long record of AFL/CIO union membership in his ordinary full-time occupation.

Doyle objected to the amount of food, to-wit spaghetti (hence, the name), that had been served to him in the cafeteria. Technically, he had nothing to do supervisory-wise with any of the cafeteria help. The objection should have been lodged with the principal. However, it was not, and it led to a rather foolish argument during cafeteria hours between Doyle and the cafeteria help as a part of which Doyle found occasion to call the help "stupid." This resulted in a complaint by the kitchen authority to higher authority, a confession by Doyle that he was wrong and an appearance by him in the cafeteria for apology purposes, which resulted in another go-round.

The SOB incident: In connection with a disciplinary complaint, Doyle, in the presence of an assistant principal and three or four involved students, referred to the students as "sons of bitches." The appellation was heard by both the principal and the students involved. That, of course, does demonstrate, in any language, a lack of maturity and tact.

The "gesture" incident is described in this record in a file memorandum of the assistant principal copied below.

> "Earlier in the year Mr. Doyle and four girl students had a little problem over the procedure that Mr. Doyle follows in supervising the cafeteria during lunch time.
>
> "Because of the fact that the snack bar is needed fifth period for a study hall, Mr. Doyle tries to start getting things cleared up around 12:15. The girls

felt this was unfair, and they began to make an obvious effort to slow things up as much as possible. After a couple days of this, Mr. Doyle confronted them on the situation and a heated verbal dispute ensued. During or at the end of the argument, Mr. Doyle gave the girls the two-fingered gesture, and of course, the girls responded with their own gesture.

"Mr. Doyle came to me and told me of the problem and the names of the four girls involved. He told me that he knew he had over-reacted and all he wanted to do was talk to the girls in order to get things straightened out.

"I called the girls to the office and Mr. Doyle did most of the talking. I only got involved when one girl began acting very rude and started getting disrespectful. During the course of the conversation, Mr. Doyle apologized for his actions and conveyed the reasons for the procedure followed in supervising the cafeteria.

"Certainly, this type of action, provoked or unprovoked, is not the type of action that should be forthcoming from a mature adult.

/s/ Walter Peters

Walter Peters
Assistant Principal"

The above needs this explanation. In what might be called the pig Latin of today, or perhaps more accurately high school sign language, the two-fingered gesture means "bull —" and the one-fingered gesture means "screw you." This incident would undoubtedly give a school board pause in connection with the extension of a tenure contract.

The final incident is referred to as the "radio" incident. In February of 1971, the principal at the high school circulated to the various teachers a memorandum on teach-

er dress and appearance. It was a rather mild page and a half affair. The plaintiff promptly called it in to a radio station in Cincinnati with which he had some established connection, which radio station promptly repeated it in substance on the air, with the comment that might be expected from a radio station specializing in acquiring young listeners. The memorandum had been prompted in the first place by the relationship between teachers' dress and public support in bond issues and that relationship is established in this record. The principal, who had an idea that publication was at Doyle's behest, called him on the carpet for it. Doyle apologized, agreeing with the principal's point that Doyle should have made some effort to give any criticism he had of it to the proper authority before going to any outside publication. Once again the incident is related to tact and maturity and all concerned must recognize that Doyle's contact with the radio station was a basic First Amendment right. On the other hand, there are tactful ways of exercising rights, or untactful ways; or, if one would prefer, there are mature ways and immature ways, and in any sort of organization immediate appeal to the outside is recognized as not desirable until its necessity is established.

Each year in the spring teachers are evaluated by the superintendent for purposes of the tender of then optional contracts in particular. The superintendent then reports to the board his recommendations. This was done in March of 1971 and specifically on March 17 the recommendation with respect to the teachers involved were made to the board. With respect to Doyle the recommendation was that the board not enter into a new contract. The same recommendation was made with respect to four other high school teachers and five elementary school teachers, and the recommendation in each instance was adopted formally

by the board. The superintendent and each of the four board members, who testified in this case, testified that his or her vote or recommendation was not based in any way on any activity of the plaintiff in the free speech or assemblage field. The board members, of course, testified, in addition, that they relied on the recommendation of the superintendent.

On April 2, 1971, the plaintiff was notified that the school would not extend to him a contract during the coming year. He asked for a statement of reasons and on the 15th he received a statement which cited "lack of tact" and gave as two examples the radio incident and the gesture incident.

It is important to note that while several other members of the teachers association, notably the ones above named, engaged in extensive activity along with the plaintiff with at least one of them being vulnerable from a non-tenure position, but nonetheless the other union-activity teachers were contract renewed. This is somewhat of an indication of a reason in the plaintiff's case. In addition, while it is apparent that the members of the association went up in arms in February of 1970 at the suspension, there appears to have been no reaction at all by the association to the failure to renew the contract in April of 1971. It is true that at the former time the plaintiff was president of the association, which he was not at the latter time; on the other hand, he was a member of the executive committee at the latter time.

Subsequently, the plaintiff secured employment at the Miami Trace Local School District in Washington Court House, Ohio, and for the three school years — 1971, 1972, and 1973 — has received wages of $29,127.00. If he had been employed through the same years with the Mt. Healthy Board, he would have received an aggregate of

$34,285.00 — a monetary damage differential amounting to approximately $5,150.00 for the period involved.

The plaintiff's reasonable attorney's fees, including reasonable expenses, to date for the prosecution of this case amount to $6,343.16. Of that amount $2,539.98 has been paid to the plaintiff's counsel by a statewide teachers association of which the plaintiff is and has been a member.

The ultimate question of fact in this, as well as any case like this, is "whether the failure of the board to renew plaintiff's contract was because of his exercise of First Amendment rights." See *George* v. *Conneaut,* 472 F. 2d 132 (6th Cir. 1972). The plaintiff, of course, has the burden of proving just that by a preponderance. See *Fluker* v. *Alabama,* 441 F. 2d 201 (5th Cir. 1970).

Under Ohio law (Chapter 3313 Ohio Revised Code) the school board is a subdivision of the state and the board members are state officers, as is the school superintendent. Board members are selected at popular elections and for all practical purposes serve without pay. The superintendent is required to report on the teaching staff annually and is specifically required (3319.11) to recommend annually to the board in respect to the future of teachers not already tenured. A broad discretion in the employment of teachers (non-tenured) is devolved upon the Board and Superintendent. In fact, a teacher not under continuance contract (tenure) may be denied reemployment for *no* reason at all. Generally the situation lends itself to a "state officer" or "broad discretion" description — whether from the point of view of the board or superintendent.

No member of the Board acted with any malice. That is true of the Superintendent. In fact, as this Court sees it and finds, both the Board and the Superintendent were faced with a situation in which there did exist in fact

reason — (see *James* v. *West Virginia*, 322 F. Supp. 217 (S.D. W. Va. 1971, aff. 448 F. 2d 785 (4th Cir. 1971)) independent of any First Amendment rights or exercise thereof, to not extend tenure. It is important to note that the new contract involved "tenure" and the record must be viewed with that in mind (i.e., prior recommendations and evaluation lose some force a/c not made in a similar situation). As we see it and find as a fact, the Superintendent and the Board were faced with a situation in which there were a number of moving causes, some permissible and some not permissible. The action based thereon, whatever its legal results, cannot be described as arbitrary or retaliatory or malicious or marked by bad faith.

Conclusions

1) If a non-permissible reason, e.g., exercise of First Amendment rights, played a substantial part in the decision not to renew — even in the face of other permissible grounds — the decision may not stand. See *Shehan* v. *Board*, — F. 2d — (3rd Cir. 1974) and cases therein cited; *Lusk* v. *Estes*, 361 F.Supp. 653 (Texas, 1973).

2) A non-permissible reason did play a substantial part. That is clear from the letter of the Superintendent immediately following the Board's decision, which stated two reasons — the one, the conversation with the radio station clearly protected by the First Amendment. A court may not engage in any limitation of First Amendment rights based on "tact" — that is not to say that the "tactfulness" is irrelevant to other issues in this case.

3) The plaintiff is entitled to a reinstatement with back pay and, upon acceptance of reinstatement at the earliest permissible time, will be entitled to tenure on the same basis as if he had been employed by the defendant

Board during the interim. There are some problems connected with this by virtue of the plaintiff's present contract and those problems will be left to the parties to work out in the first instance.

4) It seems settled enough that the remedy, if any, in addition to reinstatement and back pay (vs. the Board) is left to the Court to fashion. The only guideline seems to be "suitability" in the particular case. This is true whether this case be regarded as a 1983 one or a 1331.[1]

5) There should be an award against the Board as such for attorney's fees in the amount found reasonable -- $6,343.16 — this for the reason that the public has an interest in having its state-related institutions act in compliance with the Federal Constitution and, in a case such as this, plaintiff's counsel is in effect a private Attorney General. See *Stolberg* v. *Board*, 274 F. 2d 485 (2nd Cir. 1973); *Donahue* v. *Staunton*, 471 F. 2d 475, 482 (7th Cir. 1972); *Newman* v. *Piggie Park*, 390 U. S. 400 (1968). This should be without reference to any payments to plaintiff's counsel from private sources, and without deduction.

6) This is *not* a case for punitive damage. The Board acted here in a rather untrod field (several causes, one impermissible). This Court, while concluding as it has, recognizes a great deal of doubt and may be wrong. In such a situation it would be inequitable to award "punitive" damage.

7) The Board members, as individuals, are dismissed.

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[1] The awarding of attorney's fees in § 1983 actions rests in the sound discretion of the district court judge. *Hill* v. *Franklin County Board of Education*, 390 F. 2d 583 (6th Cir. 1968).

When the statute is silent as to remedy, federal courts have a duty to fashion an effective remedy to carry out the purpose of the statute. *J. I. Case Co.* v. *Borak*, 377 U. S. 426 (1964).

There will be no damage award against them by this Court. The same is true of the Superintendent. Each was acting as a State officer in a field necessarily involving the broadest discretionary functions. As pointed out above, the State law contains *no* guidelines to govern a board or superintendent in solving the problem of whether tenure should or should not be tendered a given teacher. Any court should be careful in constituting itself a judge of "cause" in such a field — mainly because the expertise in that field rests with the school authorities. The law recognizes a "conditional privilege" in such matters and each member of the Board and the Superintendent enjoyed it. See *Safeguard* v. *Miller*, 472 F. 2d 732 (3rd Cir. 1973); *Lasher* v. *Shafer*, 460 F. 2d 343 (3rd Cir. 1972). This conditional privilege — or, if one would prefer, governmental immunity — protects from claims for attorney's fees, damages and punitive damages, at least in cases not involving flagrancy. This is far from a flagrant case.

8) Costs are to be assessed against the defendant Board.

9) This Court has not stated any conclusion on the possible Monroe-Kenosha problem in this case since it seems that the case is properly here as a § 1331 case, as well as a § 1983 one. Somewhat similarly, no conclusions relative to a possible Eleventh Amendment problem (see *Jordan* v. *Gilligan*, — F. 2d — (6th Cir. 1974)) are stated since the parties seem to concede that O.R.C. § 3313.17 (the Board of each District shall be a body politic and corporate, and, as such, capable of suing and being sued, etc.) provides the necessary waiver.

10) A decree and judgment consistent herewith may be prepared and settled and presented.

/s/ TIMOTHY S. HOGAN
United States District Judge

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

FRED DOYLE,
1965 Connecticut Avenue,
Cincinnati, Ohio 45224,
PLAINTIFF,

vs.

MT. HEALTHY CITY SCHOOL DISTRICT BOARD OF EDUCATION MT. HEALTHY, et al.,
DEFENDANTS.

JUDGMENT ENTRY

(Filed October 11, 1974)

This action came on for trial before the Court, the Honorable Timothy J. Hogan, United States District Judge, presiding, the issues having been duly tried to the Court and the Court having entered its Findings and Conclusions on September 9, 1974:

IT IS ORDERED, ADJUDGED AND DECREED that judgment is rendered in favor of Plaintiff against the Defendant, Mt. Healthy School Board of Education and it is ordered to reinstate Plaintiff to employment and to grant him a continuing contract as a teacher; that the Mt. Healthy City School District Board of Education pay to Plaintiff the sum of $5,158.00 as damages and the additional sum of $6,343.16 at attorney fees.

Judgment is hereby and herewith rendered in favor of Defendants Rex Ralph, William C. Littmeier, Charles

Mueller, William M. Morris, Marcia Haupt and Vivian Clark, and against the Plaintiff as to any and all claims asserted by the Plaintiff against these said Defendants.

Costs are to be assessed against the Defendant, Mt. Healthy City School District Board of Education.

/s/ TIMOTHY S. HOGAN
Timothy S. Hogan
U. S. District Judge

APPROVED:

/s/ JONAS B. KATZ
Jonas B. Katz and Anthony P. Sgambati II
Attorneys for Plaintiff

/s/ JOHN C. BURKHOLDER
John C. Burkholder
Attorney for Board of Education and Individual Board Members

/s/ JAMES L. O'CONNELL
James L. O'Connell
Attorney for Rex Ralph

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO, WESTERN DIV.

[TITLE OMITTED]

NOTICE OF APPEAL BY MT. HEALTHY CITY SCHOOL DISTRICT BOARD OF EDUCATION

(Filed November 1, 1974)

Notice is hereby given that the Mt. Healthy City School District Board of Education, defendant, hereby appeals to the United States Court of Appeals for the Sixth Circuit from a Judgment entered in this action on the 11th day of October, 1974, in favor of plaintiff, Fred Doyle, requiring defendant, Mt. Healthy City School District Board of Education to reinstate plaintiff to employment with a continuing contract as a teacher and pay to plaintiff the sum of $5,158.00 as damages and $6,343.16 as attorney fees plus court costs assessed herein.

/s/ PHILIP S. OLINGER
Attorney for Defendant.
Mt. Healthy City School District
Board of Education
115 Fieldstone Drive
Terrace Park, Ohio 45174
513-831-5250

JUDGMENT, ORDER OR DECISION IN QUESTION

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 75-1382

FRED DOYLE,

Plaintiff-Appellee,

v.

MT. HEALTHY CITY SCHOOL DISTRICT
BOARD OF EDUCATION,

Defendant-Appellant.

ORDER

(Filed December 10, 1975)

Before: WEICK, PECK, MILLER, Circuit Judges.

This appeal was perfected from a judgment of the district court ordering plaintiff-appellee reinstated in his position under a teaching employment contract and awarding compensatory damages and attorneys fees. Being fully advised in the premises, the Court concludes that substantial evidence in the record supports the finding of the district court to the effect that appellant's action in refusing to renew appellee's contract was motivated at least in part by his action in informing a local radio station of an "appropriate dress code" suggested for teachers, and that the district court did not err in concluding that the refusal

to renew the contract was based on a constitutionally impermissible reason. It is further determined that the compensatory damages awarded to appellee were properly computed but that the intervening decision in *Alyeska* v. *Wilderness Society*, — U.S. —, 95 S. Ct. 1612 (1975), renders the allowance of attorneys fees inappropriate. Accordingly,

IT IS ORDERED that to the extent the judgment of the district court ordered the reinstatement of the plaintiff-appellee and the award to him of compensatory damages, it be and hereby is affirmed; it is further ORDERED, however, that the award of attorneys fees be and it hereby is vacated and set aside.

ENTERED BY ORDER OF THE COURT

/s/ JOHN P. HEHMAN
Clerk

OTHER PARTS OF THE RECORD

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO, WESTERN DIV.

[TITLE OMITTED]

EXTRACT OF PROCEEDINGS

July 22, 1974

(Filed January 27, 1975)

[2] * * *

MR. BURKHOLDER: The parties stipulate and agree to the admission into evidence of Joint Exhibits 1 through 7.

The parties stipulate and agree that the procedure followed by the Mt. Healthy Board of Education with regard to the non-reemployment of Fred Doyle was proper under the applicable state statutes.

[3] Does the Court wish us to go through these exhibits?

THE COURT: Yes. Either we can go through them or you can tell us, whichever you think is the shorter. Tell us what they show.

MR. BURKHOLDER: O. K. Joint Exhibit 1 is a copy of the minutes of the Mt. Healthy Board of Education for the meeting of March 22, 1971. This was the meeting at which the board took formal action not to reemploy Mr. Doyle and the other nine teachers.

Joint Exhibit number 2 is a copy of the report to the board of education of what they call their education committee, which consisted of all members of the board of education, as well as Mr. Ralph and two other administrators, with regard to the non-reemployment of Mr. Ralph and the other teachers.

You can say anything that you —

MR. SGAMBATI: Nothing at this time.

MR. BURKHOLDER: Joint Exhibit number 3 is a

compilation of all of the teachers in the high school, showing the date of their employment, the type of contract they were on, the total years experience, their experienc in Mt. Healthy, the expiration date of their contract, the subject or grade taught, their degree, what type of contract they were next [4] eligible for, their certification and their evaluations, and showing the numerical evaluations for each of them.

MR. SGAMBATI: That is for the 1970-71 year only.

MR. BURKHOLDER: Yes. Joint Exhibit 4 is the letter to Mr. Doyle dated April 2, 1971, sent pursuant to the Ohio statute officially notifying him of the intention of the board of education not to reemploy him.

Joint Exhibit 5 is a statement prepared by the current superintendent of the Mt. Healthy schools, which is an extract from the teachers' salary schedules, showing the salary schedule that Mr. Doyle would have been entitled to.

I might add, your Honor, we understand that Mr. Doyle may have had some additional course work since that time. So we may want to amend this as we get into it.

THE COURT: Yes, O. K.

MR. BURKHOLDER: Joint Exhibit 6 is the original of Mr. Doyle's personnel file from the Mt. Healthy school system. That has a number of notations on the folder itself, as well as a number of loose papers inside.

MR. SGAMBATI: I might also note, your Honor, that both plaintiff and defendants have removed some of the papers from the personnel file and have had them marked as their own exhibits.

THE COURT: I see. All right.

MR. BURKHOLDER: Joint Exhibit Number 7 is a letter dated [5] April 15, 1971 from Rex Ralph, superintendent, to Mr. Doyle. It is the letter Mr. Sgambati referred to as the letter given to Mr. Doyle as reasons for his non-reemployment.

THE COURT: Very well. They are admitted.

• • •

[44] **James Stragand**

called as a witness by the plaintiff, being first duly sworn, testified as follows:

MR. SGAMBATI: Your Honor, plaintiff requests permission to proceed under Rule 43(B) of the Federal Rules on cross-examination.

THE COURT: Go ahead.

CROSS-EXAMINATION

BY MR. SGAMBATI:

• • •

[47] Q • • • Now, did you have any duties respecting the recommendation for employment or the ceasing of employment of teachers working in the high school?

A Each year we administrators did have a responsibility to the [48] board and each year we would sit down in the spring of the year and assist in evaluating the entire staff.

Q You say you would sit down with the administrators?

A No. We administrators would sit down with the superintendent and the board and evaluate our entire teaching staff.

Q Did you do that during the three years in which you were principal of the high school?

A Yes, sir.

Q You did that then during the 1970-71 school year, that is the spring of 1971?

A Yes, sir.

Q Did you meet with the superintendent of schools and the board together or did you meet with them separately?

A Together.

Q Do you recall when that meeting occurred?

A No, I do not. They usually, I'd say it was in March. I couldn't say specifically.

Q Was that meeting typically before board action?

A Yes.

Q On how many occasions did you meet with the board and the [49] superintendent in March of 1970?

MR. O'CONNELL: 70-71?

Q '71. Excuse me. Thank you.

A I don't recall. I know that we spent numerous evenings on teacher evaluation on total staff.

Q When you say numerous evenings, could you approximate that for us? Are you talking about two evenings, four evenings?

A I would say at least three evenings, and I'd say each evening these sessions would last at least from 7:30 to 11:00 or 11:30.

Q Were teachers from other school buildings discussed in these sessions?

A No, not on those three, no.

Q Are you saying you met for a period of three to four hours on probably three evenings?

A Yes.

Q How many teachers were there in the high school during the 70-71 school year?

A I don't recall exactly.

Q Can you approximate the number for us?

A Probably 70.

Q Seventy teachers?

A (Nodding.)

[50] Q Did you review the file of each and every teacher?

A Well, it depends on what you mean by a file. I don't know what you mean by a file.

Q Isn't it a fact that personnel files are maintained on the teachers in the school system of Mt. Healthy?

A Yes.

Q Well, when I say did you review the files, were these files present during those meetings with the board?

A Personnel files, no. I would say that we had composite sheets where we were dealing with the total evaluation of the total staff of the high school where we would discuss at that point those pros and cons associated with all staff members.

Q Were each and every member of the staff reviewed?

A Yes.

Q How did you do that? Did you do that in alphabetical order?

A Alphabetical.

Q Did you review the situation of Mr. Fred Doyle?

A Yes, sir.

Q What, if any, recommendation did you make to the board or the superintendent respecting Mr. Doyle and his continued employment with [51] Mt. Healthy City School District Board of Education?

A I pointed out to the superintendent and the board, as I would do and did do with any staff member, the pros and cons that were associated with any teaching situation.

Q Did you make a recommendation?

A It's not my official job to recommend.

Q You didn't recommend to the superintendent of schools then what Mr. Doyle's fate ought to be?

A In pointing out pros and cons, the superintendent would have to make that decision to the board of education.

Q Are you saying he reviewed everything that you told to him and then –

A Yes, sir.

Q – made a recommendation?

A Right.

Q But you yourself did not recommend to him that he non-renew or renew; correct?

A Well, in pointing out the pros and the cons, I am sure that from the certain judgments will be made.

Q But it wasn't your job – But it was not your judgment?

A That's not my job.

Q Your job is merely to point up pros and cons or point up [52] facts –

A Right.

Q – instances?

A Right; strengths and weaknesses.

Q Did you discuss Mr. Doyle's teaching ability?

A Yes, sir.

Q And what did you say to the board – well, Mr. Ralph as superintendent, respecting his teaching ability?

A With regard to teaching, if I can recall correctly, I pointed out the fact that Fred was a fine teacher in the area of bookkeeping; that in that light I would feel that this was one of the pro or the positive aspects to Mr. Doyle and the Town of Mt. Healthy.

Q What was Mr. Doyle teaching?

A Bookkeeping.

Q Exclusively bookkeeping?

A Yes, sir.

Q Did you make any statement to the board about his knowledge of the subject matter he was teaching?

A This would have been part of me saying that he did a fine job in the classroom on the subject matter. He was very knowledgeable. He individualized instruction to the kids, to the young people, and this would have been one of the positive things that I pointed out to the board and to the superintendent.

[53] Q Did you make any observation or comment upon his rapport with the students?

A I felt in the classroom from all relationships that I knew of, that I could see, that I had observed, that the rapport in the classroom was fine. I would have had no reason to question that.

Q Was Mr. Doyle involved in any extracurricular school-related activities while you were his principal?

A Yes. He was sponsor of the Future Business Leaders of America.

Q He was a founder of that club, was he not?

A I believe. I believe he did initate the starting of this club, yes.

Q When he came to Mt. Healthy?

A I can't recall whether it would be when he came to Mt. Healthy or any one year subsequent to that time.

Q In your opinion did he do a good job with that club?

A I would have no reason to question that. I felt that he had his responsibilities with that club and with the organization and with the activities.

Q Isn't it a fact that in fact that club was one of the best clubs in the school?

A Well, you know, that's kind of an odd judgment. I don't know how you could rate — I would say it was a good club. Now, to say it was [54] the best club, no.

Q Certainly better than some?

A Possibly more active than some, but I think certain clubs just naturally end up being that way based on the limited scope of interest and many other things. The German Club is not nearly as active as a business club. There are many more young people want to be involved.

Q Do you know of some of the activities that the business club did participate in?

A I can't recall. I know that there were some — Gee,

I can't. I can't. There were some fund-raising things I believe that were for the benefit of needy families, and, you know, a number of service projects; but I can't recall back four or five years what those particular activities were.

Q Did you know that Mr. Doyle was also active in the community by way of the Boy Scouts?

A No, I did not.

Q You didn't know that?

A No, I didn't.

Q Or in the church?

A No.

Q So you didn't make any comment about that to the board of education?

A Not knowing about it, I couldn't comment about something that [55] I had no knowledge of.

Q Did you comment to the board of education about his activities in the business club?

A This was mentioned in the same vein as the responsible job he had done in the classroom.

Q And I take it you would characterize that as the pros —

A Yes.

Q — as opposed to the cons?

A Yes.

Q What other comments did you make to the board of education relative to Mr. Doyle?

A I don't recall any specific at this time, although there probably were some made. I can't recall.

Q You don't recall what you said to the board of education about Mr. Doyle?

A I can't remember speaking specifically to any other, what you would consider the positive type things.

Q Well, I am referring to all things in general. You

have said that you told them that he was a fine classroom teacher?

A Yes.

Q Good rapport with the students in the classroom?

A In the classroom.

[56] Q What else did you tell the board of education and Mr. Ralph about Mr. Doyle?

A As with any teacher at that time of year, it's necessary to discuss with the board and with the superintendent, because of their responsibility, the pros and cons involved with all teachers; so it was only natural that there were some things on a negative end of Mr. Doyle, who at that time when we were discussing him, that I felt an obligation to the board and superintendent to answer and discuss with them.

Q Now, when you say "answer and discuss," if you can recall, was there a head or someone who chaired these meetings?

A Oh, I would say the superintendent more or less.

Q That's Mr. Ralph?

A Yes, Mr. Ralph. He, of course, had the responsibility to make the judgment as to what his recommendation would be. It was natural to discuss these things with him. He needed to be informed as to what his recommendation would be at that time.

Q And this was respecting all teachers in the high school?

A All teachers; yes, sir.

Q And I take it you said good and bad about many other teachers [57] in the high school?

A Yes, if it was necessary.

Q Well, tell me, were you asked by Mr. Ralph whether in fact Mr. Doyle — what was bad about Mr. Doyle or what he did do he shouldn't have done?

A I don't recall whether he asked that specifically.

Q Did any of the board members ask you that kind of question?

A I couldn't say specifically. It's been quite awhile.

Q Well, is it possible that they could have asked you?

A We did get into a discussion. As far as who asked an individual as a board member or Mr. Ralph, I don't remember. I couldn't say.

Q What did you tell them about Fred Doyle other than his ability in the classroom or rapport with the students?

A Incidents that I think needed to be concerned in light of the continuing contract. Some of those incidents would have been the incident with students in the cafeteria where I felt that a prethought would have not created the problem, in his obscene gesture to the young people.

Q Well, were you aware of this incident?

A Yes.

[58] Q Could you describe — Well, how did you become aware of this incident?

A Through my assistant principal who was involved in the incident at the time.

Q Did your assistant principal report this information to you?

A Yes.

Q You did not observe anything?

A No.

Q You didn't observe the incident?

A No.

Q Did you ever talk to Mr. Doyle about that incident?

A My assistant principal had talked with Fred.

Q I think the question is: Did you talk to him?

A No, I don't recall that I did. I don't recall.

Q Certainly you didn't call him in and warn him that this was something bad on his record?

A This was discussed – Did I?

Q Yes, did you?

A My assistant principal did.

Q You did not? The question is: Did you?

A No, I did not.

Q What did you tell the board about the incident of the obscene gesture that you are referring to?

[59] A I reported the fact as I knew it as it was reported to me by the assistant principal, and that was –

Q Did you report to them that you had not observed the incident nor were you personally aware of it?

A Yes.

Q You did report that?

A Right. I would have no right to question my assistant principal's observation of the situation.

Q Was Mr. Peters present at the meetings, the meetings on the evaluations?

A I believe he was, yes.

Q But it's your recollection that you reported what occurred, not Mr. Peters? I am saying reported to the board.

A I don't recall.

Q What do you recall you reported?

A I knew the situation was discussed. What I actually said in that situation is almost impossible for me to recall word for word; the same as Mr. Peters was there and he was involved with some of the discussion on this also.

Q I believe you testified you may have been asked about this incident. You did report this incident?

A Yes. I felt an obligation to report this.

Q Would you tell us what you reported to the board of education?

[60] A The incident was discussed at that meeting or in the series of those meetings with the board and superintendent; and the incident as we discussed it would have been a mutual discussion between Mr. Peters and myself to clarify to Mr. Ralph and to the board that particular problem. Now, what did we say about that problem or the situation or what did exist?

Q Yes. How did you describe it to the board of education?

A We described the incident to the fact that there were at least four girls, possibly more, involved in a situation with Mr. Doyle, in action –

Q Excuse me. These are high school students?

A Yes.

Q High school students?

A Yes, high school students.

Q Were they seniors?

A I don't know.

Q O. K.

A I don't recall. I would say they were – They were high school students.

Q O. K.

A I don't know what class they were in or not. I'm sure that in stating this to the board we described the incident the best we knew what happened at that time.

[61] Now, that was initiated to Mr. Peters from Mr. Doyle himself, who came down and said, "I have this problem. I think we better get it straightened out"; went and I understand got the girls and he came back and discussed it.

The girls were making some comments, from what I understand in the hallway, which upset Fred. He did turn around and give them a sign which they returned with their own.

Q Which sign?

A It would be the (indicating) — the sign with the index finger and the small finger.

Q This sign being the index finger and the small finger?

A Uh-huh.

Q And you say you reported then that Mr. Doyle came down to see Mr. Peters, brought these individuals into the office?

A Right.

Q They needed some attention, some reprimand for some reason; right?

A I think the combination of things, yes, they probably did need some attention and some reprimand; but also I believe the attitude at that time was: "This incident did occur. I would like to get those [62] young ladies in here and get this straightened out. I did do something that caused them to react. They were talking to me," and so forth, coming down the hall.

So I think Mr. Peters did get involved and to handle and to work with that situation at the time.

Q When did you become aware of the incident?

THE COURT: So this Court might understand something about this, you will have to bear in mind that this Judge graduated from high school 48 plus years ago.

Now, if we were to ask what that sign means, would we thereafter have to say "Expletive deleted" or can you explain it? What does it mean?

THE WITNESS: I believe in the eyes of young people it would have meant, to be quite blunt about it, bullshit.

THE COURT: O. K. Thank you.

Q That's your interpretation of that gesture?

A That would be my interpretation of that gesture.

Q I take it none of the students told you what they thought it meant? In fact, you didn't see the incident or speak to the students, did you?

A With their reacting with an obscene gesture, I would more or [63] less feel that they felt it was an obscene gesture given to them.

Q You don't know what happened prior to that which prompted Mr. Doyle to do that or after that, do you. You weren't there?

A I wasn't there.

Q When did you become aware of this incident?

A I would say — I don't know exactly. I would say shortly after the incident a conference was held in the assistant principal's office.

Q Shortly thereafter, meaning a day or a week, two weeks?

A The same day or, if it was late, it was probably after lunch. It might have been the following morning. I can't recall. But I would say it would have been relatively close to the time of the problem.

Q Do you know when in the school year this occurred?

A Early, first quarter of it, I would guess.

Q First quarter of it. Approximately October maybe of 1970?

A I couldn't say for sure.

Q But the earlier part of the year?

A I would think so, yes.

Q And it's your recollection you became aware of it shortly thereafter; correct?

[64] A Yes.

Q Did you write any notation, make any written memoranda of that discussion with Mr. Peters of the incident?

A No. My assistants were told to make note of these types of incidents, which I am sure they did; and after, when Mr. Peters presented the situation to me as my assistant, he indicated that he had talked with Fred and

that this did happen and then Fred did apologize to the girls.

MR. SGAMBATI: Well, that wasn't the question. I request that that portion of —

A (Continued.) I saw no need to do a lot of documentation, if you want to call it, at that time.

Q Do you know if a memorandum was eventually written on that incident.

A Yes.

Q Do you know when it was written?

A I would say in the spring of the year.

Q After the board's action?

A The actual document you are talking about, yes.

Q I am talking about a written memorandum. You are aware that there is one in the personnel file of Mr. Doyle —

A Yes.

Q — on this incident?

[65] A Yes.

Q That's by Mr. Peters, is it not?

A Right.

Q Did you direct him to write that memorandum?

A I believe I did.

Q Do you know when you did that?

A I believe it was in the spring of the year.

THE COURT: Do you want these?

MR. SGAMBATI: Your Honor, in the personnel file, I think it may have a copy of that. Excuse me.

Q I am going to hand you what has been previously marked for identification purposes as Defendant's Exhibit number 5 and ask you if you can identify that document?

A Yes.

Q Have you seen that document before?

A Uh-huh.

Q Is it dated?

A No, it's not.

Q Does it begin with "Earlier in the year"?

A Yes, sir.

Q You say you directed Mr. Peters to make a notation or a written report of the incident in the spring of the year?

A Yes, but they are required to keep notes on problems as the [66] year goes along, not in any formal documentation.

Q Do you recall if that memoranda was written or if you directed that that memorandum be written before or after your meetings with the board of education?

A I don't recall if it was before or after.

Q Could it have been after?

A It could have. It could have been before.

Q In any event, it was long after the incident occurred?

A Yes.

Q You have testified that you told the board of education about that incident, you and/or Mr. Peters?

A Both.

Q What was their reaction, if any?

A In the light of this incident by itself there was some concern, although I would say that this was just one of the things that the superintendent and the board had taken in consideration.

Q Were all the board members present during those meetings?

A I believe so, although I don't recall. I couldn't state for sure.

Q And Mr. Ralph was present?

A Yes.

[67] Q You don't recall what their reactions were, what they may have said when you mentioned that incident?

A No, I do not.

Q And you didn't say to them, I take it, that "Here is an incident and it is cause for his non-renewal"?

A No. I stated that this was one incident where I felt that it was a situation where a little prethought wouldn't have created the situation that finally existed at that time.

Q What situation existed? Was t'.re disruption of the school day because of that?

A Disruption to the school day?

Q Yes. That's the question. Right. Was the school day disrupted in any way because of that?

A The total school operation for that day?

A Yes.

A No. No. I can't say that it disrupted the total school operation.

Q In fact, Mr. Doyle brought the four girls that were fairly causing him some difficulty down in the office –

A Right.

Q – to be disciplined, and he in fact told Mr. Peters? At least that's what was reported to you; is that correct?

[68] A He did tell Mr. Peters what had happened, yes, right.

Q By the way, Mr. Stragand, do you recall how long the discussion lasted during those meeting on the renewal or non-renewal of Fred Doyle?

A No, I do not.

Q Can you approximate? Are we talking about an hour or 15 minutes or three hours?

A No, I couldn't say. I couldn't really guess on that.

Q What else did you tell the board members and Mr. Ralph about Mr. Doyle?

A I believe another area of concern that was discussed was one where I had released a teacher memo on dress and as a result of the release of that memo this was broadcast over one of the local radio stations. And, of course,

my concern was not to the fact that a person has a right to do this but strictly along the lines with communications that we have. I thought if there was a concern over the memo that I published that a teacher, I think knowing me, should have felt at least like coming and talking to me about the concern, and this was not done.

And this particular thing also was discussed with the board of education from strictly the standpoint that I felt that there had to be some professional trust between administration and staff; and I don't [69] think it was shown in that situation.

Q What specifically did you tell them that Mr. Doyle did?

A What Mr. Doyle and I had discussed about the knowledge that the radio station had of my memo that was released. I understood that – I released that memo, talking about teacher dress, talking about professional image, talking about the problems that we were experiencing in supporting schools and the fact that we needed to be concerned about any backlash that we would be getting from our community in support of our schools and the education of our young people, and thinking how we would present ourselves.

As a result of this memo the local, one of the local radio stations, WSAI, which is mainly a young person's station, upon entering school one morning I found out that there had been a broadcast made.

Q Did you hear the broadcast?

A I did not.

Q What was your understanding of the broadcast?

A My understanding was that there had been statements made over WSAI about the fact that the administration of the Mt. Healthy City Schools felt that the teachers needed to dress good. I did not hear the broadcast.

I naturally thought now, since this seemed to deal, right after [70] I had released the memo to staff, with the problems associated with my memo, who had talked to WSAI; and I knew from prior knowledge that Fred did know some disc jockeys or at least a disc jockey.

Q Do you know how he knew that disc jockey?

A Yes, I know.

Q How did he know that disc jockey?

A There was involvement in arranging I believe it was a benefit basketball game at the school.

Q Was it his club that worked with the heart fund of WSAI?

A Yes.

Q And that's how he knew the disc jockey?

A That's right.

Q You yourself did not hear the broadcast?

A No, I did not.

Q Was it your understanding that that broadcast was of any extensive duration?

A I would have no way of knowing that.

Q How did you find out about it?

A I don't recall exactly who mentioned this. I want to say it possibly was one of the secretaries when I went into the office in the morning who said, "Did you hear the radio?"

And I said, "Yes"; and they mentioned the fact that there had [71] been something on there, on WSAI, about dress code for teachers in Mt. Healthy.

Q There was something on WSAI about the dress code?

A Right.

Q That's all that you were told?

A Right.

Q You weren't told that it criticized the dress code or

anything, just that there had been some comment about dress code?

A The indication was that it was criticizing the fact that we as administrators felt a need to talk to teachers about dress and the dress code. That was the feeling that I got from the comments.

Q When did this occur?

A I don't recall the exact date. February? I don't know. The date is on the memo. The thing on the news media was a day after the same day. I couldn't say.

Q Did you make a written memorandum of that incident?

A I talked with Fred about the situation and then I asked him if he knew anything —

Q No. The question I think, Mr. Stragand, was this: Did you make a written memoranda of the incident?

A At that particular time I did not.

Q When did you?

[72] A In the spring of the year.

Q Was that after the meeting with the board of education and Mr. Ralph —

A I don't recall.

Q — on the evaluation of Mr. Doyle?

A I don't recall whether it was just prior to that meeting or as a result of that meeting.

Q What was the board's reaction, the members of the board reaction, if any, to what you told them about the WSAI incident?

A I couldn't honestly recall what their reaction was at that time.

Q You don't recall anything about their reaction, whether it was positive, negative, noncommittal?

A No. I would say there was a concerned attitude;

but to what they said or exactly how they reacted, no, I can't recall that.

Q Did they say anything to the effect that they knew Fred Doyle?

A That they knew Fred Doyle?

Q Yeah.

A I don't understand the question.

Q My question was: Did any of the board members say to you that they knew Fred Doyle or knew about Fred Doyle?

[73] A No, I don't think that entered the discussion —

Q Did Mr. Ralph —

A — anything about Fred Doyle.

Q What, if anything, did Mr. Ralph say in reaction to —

A I don't know.

Q You don't recall?

A (Shaking head.)

Q What else, if anything, did you talk to the board of education about regarding Mr. Doyle?

A Another incident that was involving another one of my assistant principals, where some students had been ejected from a snack bar for a period of time. I don't recall how long. And upon my assistant principal taking the young people down to the snack bar to reemphasize with them how they were to behave in there and with Mr. Doyle and what we expected of them and they weren't to return.

In reporting back to me he was quite alarmed to the fact that when he approached Mr. Doyle and said, "I would like to talk to you about these four young men —"

Q Now, you are talking about what someone else told you; right?

A That's right. And again, I would have no reason to question it.

[74] Q But you are talking about what someone else told you?

A That's right. That's right.

Q You weren't there?

A My professional trust in my assistant principal would tell me that I believed him.

Q I am not questioning your trust or mistrust.

A Right.

Q I just want to be sure that I know the fact. And you weren't there; right?

A Right.

Q And you reported something to the board of education —

A Right.

Q — on an incident that was reported to you by your assistant principal?

A Right.

Q What else did you report to them?

A And in it — Well, in approaching Mr. Doyle with these young people, as I said, as was indicated to me by the assistant principal, Mr. Doyle I am sure was still upset with these four young people, referred to Mr. Shell and said, "Those are little S O. B.'s," abbreviated; and, of course, at that time when Mr. Shell reported this to me he was quite shocked in the situation that this would have been said, that he did say that [75] the students were nearby; he didn't know if they had heard or not.

Q And who was this?

A Mr. Shell.

Q Mr. Shell?

A Ralph Shell.

Q Do you know when that occurred?

A Let's say that happened in the spring of the year.

That date I don't know. Early spring. I don't know exactly.

Q The spring of the year. The spring of when?

A Of the following – The last year that Fred was at Mt. Healthy.

Q Mr. Stragand, was there any written memorandum made of that?

A I believe not. I don't recall any.

Q Was Mr. Shell present at the meeting with the board of education?

A No, he was not. I don't believe he was.

Q You think Mr. Peters was present though?

A I am pretty sure Mr. Peters was there, yes.

Q Do you know how long Mr. Doyle had worked the cafeteria duty at the school?

A How long in months or what? A year or two.

Q Isn't it a fact that he served two years?

A I believe that's correct.

[76] Q And isn't it also a fact that he volunteered for that duty during the 70-71 school year?

A That could possibly be true, although I couldn't state for sure. I doubt if the original assignment was voluntary though.

As I said, I am talking about if it was two years, the first year, I doubt if that was voluntary. That probably was something that I asked him to do as an additional assignment. The second year, I couldn't say that he did or did not. I don't recall. Possibly yes. I don't know.

Q What else, if anything, did you relate to the board of education and to Mr. Ralph regarding Mr. Fred Doyle at the meeting in March 1971?

A Another incident that did occur between the cafeteria workers and Mr. Doyle which Mr. Ralph had knowledge of, and the board.

Q I am asking you what you related to them. I am not asking you what someone else may have had knowledge of. Did you bring this up specifically?

A It was discussed, whether I brought it up specifically. I may have. I don't recall. It was discussed.

Q Did you have personal knowledge of that incident?

A Yes.

Q Were you there?

[77] A I was not there. If that's what you are referring to, personal knowledge, I was not there.

Q You were not present and you were not sure whether you brought it up?

A That's interesting because in a building as large as ours I couldn't possibly be all places at all times.

Q I am just asking you as a matter of fact whether you were there.

A Right.

Q This incident you are referring to that was discussed during that meeting involved a serving of spaghetti in the cafeteria; correct, portion of food?

A Portion of food, serving of what, I don't know.

Q Mr. Doyle had some concern of the amount of food that he was getting?

A Yes.

Q And that's basically the reason or that's basically the incident, is it not?

A That being basically the incident?

Q Is that basically the discussion on the incident in the board meeting?

A No. I would say the incident in the board meeting stemmed from that, but it was related to the confrontation that Mr. Doyle had with [78] cafeteria workers in that additional portion of food or additional plate of lunch or whatever it was at the time.

Q Do you know when that occurred?

A I'd say it was early, early in the last year of Fred's employment there. It would have been either early that year or late in the year preceding.

Q Well, isn't it a fact though that occurred in the winter of 1970?

A I don't — I couldn't say for sure.

Q But you had no personal knowledge of that incident; correct?

A No. It was reported to me initially by the supervisor of the cafeteria and one of the workers.

Q You say Mr. Ralph had knowledge of that fact?

A Yes. It was at that time reported to Mr. Ralph by Mrs. McMullen, who was our dietitian.

Q Was there anything else discussed about Mr. Doyle?

A I think the general feeling that was discussed with the superintendent and the board was one of, "Is this going to be a continuing thing?" and, "Are we going to continue to have poor judgments made in given situations?"

I don't know that any one specific thing carried more weight than any other in the discussion.

[79] Q In other words, as far as you were concerned, the WSAI incident carried as much weight, at least in the discussion carried as much weight —

A Right.

Q — as the incident with the gesture or the incident with the spaghetti?

A They were all —

MR. O'CONNELL: Object to "carried weight" because it's asking the witness to put himself in the mind of the board.

THE COURT: Sustained.

Q Were there any other discussions about Mr. Doyle?

A At the present time I can't recall any.

Q And you say you did not make any recommendation as to what his status should or shouldn't be for the following year?

A No. I stated that my responsibility is to discuss total teaching staff of high school, as I indicated to you that we did yearly, and that I felt an obligation to the board and the superintendent to discuss with them the strengths as well as the problems that existed; and that's exactly what I did.

Q And you also testified that you did speak to the weaknesses of other teachers?

A Yes, sir.

Q Do you know that some of those teachers were renewed for the [80] following school year?

A At the present time I couldn't say. I am sure that there were some problems where teachers were rehired based on experience and what adjustments had taken place and so forth. But I couldn't speak to you that specifically, no.

Q Mr. Stragand, have you been a member of the Education Association of Mt. Healthy?

A Yes, sir.

Q What position did you hold when you were a member?

A Teacher, counselor, administrator.

Q You were an administrator and a member of the Education Association?

A I couldn't say that for sure. Possibly the first year I was assistant principal, but I couldn't say for sure.

Q You were not a member of the Teacher's Association, I take it?

A No.

Q Tell me, during your presence in the meeting with the board of education and Mr. Ralph on the renewal of

Mr. Doyle's contract, was there any discussion of the Hinkle incident?

A I don't recall that there was at that meeting or those series of [81] meetings.

Q Let me understand you correctly. You had probably in the neighborhood of three meetings which lasted —

A At least three, yes.

Q — in the neighborhood of three to four hours?

A Right.

Q And you reviewed the status of 70 to 80 teachers?

A I would say in the neighborhood of 70 or 80.

Q Was Mr. Doyle discussed on more than one evening?

A I would say that probably — I don't recall. I would guess and say that there was somewhat of a wrap-up.

Q There was somewhat of a wrap-up?

A The final evening of evaluations, but I don't recall for sure.

Q And as far as you recall, there was no discussion of the Hinkle incident?

A I don't recall. It may have been discussed, but I don't recall. But it seemed to be a big issue of concern.

Q You do recall discussing the WSAI incident; correct?

A Yes.

Q You do recall discussing the incident in the cafeteria over the [82] spaghetti; correct?

A Yes.

Q You do recall discussing the incident in the cafeteria with the gesture?

A Right.

Q And you also recall discussing an incident where some students were returned to the snack bar —

A Right.

Q — by Mr. Shell?

A Those were incidents that were more closely — that

was that year. We may have discussed the Hinkle incident. I can't say for sure. We did discuss it, but I don't know whether we discussed it that year or that night. I don't recall exactly when there was concern about that.

Q Well, what other opportunity would there have been for you to discuss it?

A We meet with the board of education quite often periodically throughout the year on many occasions, dealing with many things.

Q Well, tell me: When you are reviewing teachers in the spring of the year, are you reviewing only teachers whose contracts are up for renewal or non-renewal?

A All teachers.

Q You review all teachers?

A (Nodding.)

[83] Q The preceding year, 1969-70, Mr. Doyle's contract was not coming up for renewal; correct? He was on a two-year contract?

A Right. But we discussed all teachers every year.

Q Did you discuss Mr. Doyle the year before?

A Pardon me?

Q Did you discuss Mr. Doyle the year before?

A I am sure it would have been the case, yes.

Q Do you recall what you told the board about Mr. Doyle the year before?

A No. No, I do not.

Q Are you testifying that possibly you discussed the Hinkle incident —

A Possible.

Q — but you don't know when? You are not sure that it was at that meeting?

A No, I don't.

Q Did you bring up the Hinkle incident, whenever it was discussed?

A Again, I don't recall whether I initiated it or who initiated it.

Q Did Mr. Ralph know of the Hinkle incident?

A Yes. Mr. Ralph was very familiar with it.

Q In fact, the entire board knew of the Hinkle incident, did they [84] not?

A I believe so.

Q Do you recall how long you talked to the board of education about the positive factors, pros, of Mr. Fred Doyle?

A No, I couldn't. I couldn't say that. I don't know. I know they were discussed. About 15 minutes, a half hour; I don't know. I really couldn't say.

Q Do you know if the discussion on the negative factors was longer than the discussion on the positive factors?

A I would say yes, and I think that that's only natural.

Q That's only natural?

A (Nodding.)

Q It's only natural that a board would spend more time talking about those incidents than a fine classroom teacher?

A Yes, I think for clarification on their part because of the responsibility that they had. That's only natural.

Q You were aware of Mr. Doyle's activities on behalf of the Teacher's Association, were you not?

A That depends what you are referring to.

Q I am talking about him being president.

A I knew this; yes, sir.

[85] Q And I am talking about him acting as chief negotiator of the Education Association.

A This I did not know.

Q Did you know he participated in association matters though quite frequently?

A I am sure, being president, he was very much involved.

Q Were you aware of the grievance that he filed of hospitalization benefits?

A No, I was not. I knew that there were some teachers concerned, but I did not know that Fred had filed a grievance on that.

Q Was that matter discussed in the meeting with the board and the superintendent of schools on evaluation?

A No.

Q That matter was not?

A Pardon me?

Q That matter was not?

A That matter was not discussed.

Q You indicated earlier that you had a concern for teachers acting professionally and having a professional image and certainly portraying this image to the community. In fact, that's what prompted your policy on your dress code?

A My memo.

Q Your memorandum?

[86] A Right.

Q Tell me, you say that was discussed? The WSAI call was discussed?

A Yes.

Q Was the board policy discussed during that meeting?

A Not that I recall. I don't think we discussed board policy.

Q Board policy as it would relate to that particular incident?

A No. The discussion was more along the line of my concern as to why this was released to news media without having talked to me about something that I had put in

the memo; and I don't recall going into the discussion about board policy.

Q Why were you concerned about this being put out to the media?

A As a high school principal I was naturally concerned. I had much time invested in the school system and in the young people; and I was much concerned about public reaction and any backlash, if you want to call it that, that could come from something being misinterpreted or being given to the public over news media in a certain way with a certain tone to it.

There may have been a statement in this memo that I wrote [87] that could have been stated differently or could have been handled differently. I am not perfect, but the fact is and the concern at that meeting was that this was not a point that was discussed at all. It was released in the news media right away, not that we questioned or I didn't question Mr. Doyle's right to have done this. But I felt I communicated with staff; if they had some question or some concern, that they should come and discuss that issue with me.

Q So that they should clear the communications with the media with you regarding communications between you and them?

A I had hoped that they would, to eliminate duplication and many of the problems that could exist.

Q And I take it when you explained to the board of education this incident, you described it as certainly a negative thing, did you not?

A Well, I think that you could characterize it as being a problem.

Q You characterized it as being a problem, did you not?

A I felt it was a problem at the time, yes.

Q And you say there was some concern demonstrated

by the board of education to the effect that this would be a continuing problem. Who expressed that concern, if you know?

[88] A I couldn't say anybody specifically expressed that as a concern, the way you stated it. I think my feeling is in the total discussions that the board and superintendent had to be concerned about this in the teaching in the staff. So it was one of these concerns that were voiced and considered in regard to Mr. Doyle.

Q Well, if you can recall, was there more discussion on that incident than others?

A I can't say that one incident carried any more weight than any other.

Q I mean you can't say what weight. I am just talking about actual time spent.

A No. I don't recall that there was any more time spent.

Q By the way, were you principal when Mr. Doyle received merit pay from the board of education?

A No.

Q You were principal during the year in which he was receiving it, were you not?

A It could me.

Q Isn't it a fact that he received merit pay for excellence in teaching during the 69-70 school year?

A For duties performed in what, 68-69?

Q Yes.

A That could possibly be true.

[89] MR. SGAMBATI: Just a moment, your Honor.

Q Mr. Stragand, have you told us everything that was discussed by the board of education when you were present, and the superintendent also in your presence, on the subject of Mr. Fred Doyle?

A I believe so.

MR. SGAMBATI: No further questions at this time.

THE COURT: Very well. We will recess until 9:30 tomorrow morning.

(At 4:42 p.m. an adjournment was taken to Tuesday, July 23, 1974 at 9:30 a.m.)

REPORTER'S CERTIFICATE

I, Robert I. Crawford, Official Court Reporter for the United States District Court for the Southern District of Ohio, appointed pursuant to the provisions of Title 28, United States Code, Section 753, do hereby certify that the foregoing is a true and correct transcript of an extract of proceedings had in the within-entitled and numbered cause on the date hereinbefore set forth; and I do further certify that the foregoing transcript has been prepared by me or under my direction.

/s/ Robert I. Crawford

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[90] **James Stragand, resumed.**

THE CLERK: You are still under oath, Mr. Stragand.

CROSS-EXAMINATION

BY MR. O'CONNELL:

Q Mr. Stragand, I wonder if you would tell the Court, first of all, how old you are?

A Thirty-five.

Q Are you married?

A Yes.

Q Do you have some children?

A Two.

Q All right. And what is your educational background?

A Bachelor's degree, University of Cincinnati and a master's degree, U. C.

[91] Q In what areas are those degrees?

A Bachelor's degree was in education, teaching, P. E., biology and health; master's degree in guidance and administration.

Q All right. And you have been then in the Mt. Healthy school system ever since; is that correct?

A Yes, 13 years.

Q How long have you known Mr. Doyle?

A Well, the five years that he was teaching at Mt. Healthy.

Q And what was your position in the school system at the time when Mr. Doyle was employed there and prior to the time that you were principal of the high school?

A In what capacity?

Q Yes. Were you then assistant principal?

A Assistant principal and principal –

Q All right.

A – guidance.

Q All right. Now, could you tell the Court what your own personal relationship was with Mr. Doyle insofar as what rapport that you had with him or felt that you had with him or felt that you had with him?

A Generally speaking, I felt that I had pretty good rapport with Mr. Doyle.

Q All right. Did you consider him a friend?

[92] A Yes.

Q All right. Now, one of the incidents that was brought up yesterday involved the cafeteria and the size of the helping that Mr. Doyle got. Let me ask you: Did

he have any responsibilities with respect to the cafeteria during these times?

A He was in a responsible — His responsibility in the cafeteria was a supervisory type job.

Q Of the students or of the persons employed there?

A Of the students, eating and just general observance, seeing that they were picking up their trays and returning the dishes.

Q Did he have any supervisory responsibility over the dietitian and the cooks and the other nonteaching personnel employed there?

A No, he did not.

Q All right. Now, going back to the incident in which I believe you said he had a confrontation with one of the personnel, Mrs. McMullen. Prior to that time had you issued any instructions to your teachers regarding the reporting of any problems in the cafeteria to you, that is problems with the nonteaching personnel working there?

A The question is not clear.

Q Well, what was the standard operating procedure if a teacher [93] had some disagreement with a nonteaching employee regarding cafeteria matters?

A Why, I would hope, and I am sure that I would communicate this to staff, that if there was a problem that they should have talked to me about it.

Q All right. Now, that was so that you could then handle it yourself —

A Right.

Q — with the cafeteria people?

A (Nodding.)

Q All right. Now, I believe you said yesterday that the, for the lack of a better word, we might call the spaghetti incident, was one of the matters that was discussed

at the March 1971 evaluation session after which Mr. Doyle was not renewed. That was one of the matters, was it?

A Yes, that's true.

Q Now, how did the spaghetti incident first come to your attention?

A The confrontation that did happen was reported to me by Mrs. McMullen.

Q Now, may I interrupt you there and ask you: Who is Mrs. McMullen?

A She is the supervisor of the cafeterias and dietitian.

Q All right. Now, after — Well, let's put it this way: What did [94] Mrs. McMullen report to you?

A I can't recall exactly word for word what she said. It was along the line that there was a disagreement between Fred and a cafeteria worker over an additional proportion of food, and that they did have words, that Fred had not paid for the additional plate lunch or additional portion; and there was some reference to derogatory comments, which I believe she did break the incident up.

Q She wrote it up to Mr. Ralph?

A I believe so; yes, sir.

Q All right. Now, was it your understanding that this incident occurred while students were present?

A It was my understanding at that time.

Q All right. Now, subsequent to getting a report of this matter from Mrs. McMullen, did you discuss it with Mr. Doyle?

A After gaining knowledge from her the incident occurred I did talk with Fred.

Q All right. Tell us what occurred on that occasion when you and Mr. Doyle discussed the spaghetti incident.

A Right. My feeling was that I had always indicated to staff, because Mr. Ralph as superintendent always told us, that teachers should have plenty to eat, that if there was

some concern about proportions of food that all they need do was let us know. This I did let my staff know.

[95] Q That was before the incident?

A Right.

Q All right.

A And so in the light of talking with Fred, I did mention the fact that, "Fred, you know, if this was a problem, you should have come to me and let me know that you were concerned about the portion of food."

Q All right. And what did Mr. Doyle say when you pointed that out to him?

A As usual, when I would talk to Fred, he would indicate that he understood, that he should have come and talked to me, that he was wrong and he would go back and would apologize to the ladies in the cafeteria.

Q All right. Did he say anything about working to improve in this category, this tendency on his part?

A This generally seemed to be the tone, yes, that it would improve.

Q All right. Now, would you say that as principal you had an open door policy with respect to teachers being able to come in and converse with you on any problems that they might have?

A Yes, sir. I would hope that that would have been the case.

Q All right. Now, another matter that was touched upon in the questioning of you yesterday by counsel for the plaintiff was what we might [96] refer to for lack of the better term as the Hinkle incident, and I believe you said that it is possible that it came up in the March evaluations, but you are not entirely certain?

A It's possible, but I am not positive.

Q But, in any event, the matter was of sufficient notoriety when it occurred in 1970 that the board would have known it from that?

A Yes.

Q All right. Now, how did the Hinkle incident first come to your attention?

A Through Mr. Shell, assistant principal.

Q All right. And tell us what occurred when Mr. Shell brought it to your attention.

A O. K. Ralph Shell came to my office and indicated to me that we had a problem —

MR. SGAMBATI: Objection, your Honor.

THE COURT: Overruled.

Q And after he gave that indication to you, did you have Mr. Doyle come into your office?

A Yes.

Q All right. Tell us what occurred when you and Mr. Doyle got together on that occasion.

A O. K. I talked with Fred briefly, guessing time, could have been 10 to 15 minutes.

[97] Q All right. Tell us what Mr. Doyle's condition was insofar as you could observe it at that time.

A Very upset, tears in his eyes, very disturbed about the fact that, in what he indicated to me, that Mr. Hinkle had slapped him.

Q What about his voice?

A Cracking.

Q All right. In the condition that he was then in as observable by you as the principal, would you have permitted him to go into a classroom and attempt to teach students?

A Not right at that point.

Q All right. Now, after discussing this with Mr. Doyle for, I think you said, about 10 minutes, did you then bring Mr. Hinkle into the conversation?

A Yes. I felt it was best to leave Fred in my office away from people, giving him a chance to calm down to some degree. In the meantime I did go and get Mr. Hinkle from his classroom, from his room.

Q And you brought him where?

A To my office.

Q So it was Mr. Hinkle, Mr. Doyle and yourself?

A Yes, sir.

Q Was anyone else present in your office?

A No.

[98] Q And what happened then at the three-way meeting between Fred Doyle, Russ Hinkle and yourself?

A I tried to find out best I could what had happened in this classroom prior to the beginning of school. In talking to the two men, getting them to relate why the situation took place, I tried to establish with both of them that as principal of that school we could not have this type of confrontation going on among staff, that I could not put up with this, that we were not going to have it; and I had hoped that we would be able to get this ironed out at our level in our building.

Q All right. Now, as far as you were advised, was anyone else present at the time of the slapping incident besides Mr. Hinkle and Mr. Doyle?

A As far as I know, nobody.

Q All right. And did the incident arise as far as it was reported to you from school business or some other business?

A As to what was related in my office, when both men were there, Mr. Hinkle indicated that he was perturbed by Fred through some comments that were made and he overacted him and did slap him; he was wrong.

Q What were they talking about? Was it the teaching

assignments of either one of them or was it something else?

[99] A No; I would say it was related to the association.

Q All right. Mr. Hinkle would have been one of Mr. Doyle's constituents as a member of the association?

A I believe he would have been a member of the association.

Q All right. Now, while the three of you were in your office did Mr. Hinkle apologize to Mr. Doyle for having struck him?

A Yes, he did.

Q And was that one time during that session or was it more than one time?

A On two occasions.

Q All right. Incidentally, how long, approximately, did the three-way meeting last?

A Approximately an hour.

Q All right. Now, after these two occasions on which Mr. Hinkle apologized to Mr. Doyle, what was Mr. Doyle's reaction to that?

A He just said to Russ that he felt he could not accept the apology.

Q All right. Now, did you know Mr. Hinkle for some period of years in addition to knowing Mr. Doyle?

A I had known Mr. Hinkle approximately eight years at the time.

[100] Q All right. As far as you could tell, from the demeanor of Mr. Hinkle and the manner in which he apologized, did you evaluate it as a sincere apology?

A I would have had no reason to question it.

Q All right. Now, during and at the conclusion of the three-way discussion between Mr. Hinkle, Mr. Doyle

and yourself, what was Mr. Doyle's condition at that point insofar as you could observe?

A I would have to say that probably Fred had calmed down slightly, but still was very upset, very flushed, very red, voice still cracking, still seemed quite disturbed.

Q All right. What in your opinion was his ability to teach at the conclusion of that meeting?

A I would say that he still was not ready to teach.

Q All right. Did he say anything about whether or not he felt he was able to resume teaching at the end of that hour session?

A Not right at the end of that hour, no.

Q Now, after you spent this hour trying to solve this problem between the three of you, what action did you take at that point?

A The only alternative I had at that point, since we couldn't seem to come to a conclusion or solve this at our level, was to tell both of the [101] men that my only alternative was to refer the incident to the superintendent of schools, Mr. Ralph.

Q Did you spend some time talking then just with Mr. Doyle after the three-way discussion?

A Yes. At that point, when I indicated that I would have to refer this to the superintendent, Mr. Hinkle indicated that, "Well, if this is the way it has to be, then I guess that's what's going to have to be or have to happen"; and he excused himself at that point, and that was after about the first hour.

Q All right.

A I did stay at that point for I would say another 45 minutes to an hour and talked with Fred with the sole purpose of trying to get him calmed down to the point that he would be ready to go back and fulfill his duties as a teacher.

Q Did you get him calmed down to the point where you felt he could resume his teaching duties?

A No, I did not.

Q What did you do with respect to his classes that day then?

A We did call in a substitute teacher. I did recommend to Fred that he go home and try to get himself together. I believe we covered possibly one class or so by use of guidance counselors.

[102] Q All right. And did Mr. Doyle acknowledge that he was unable to continue teaching at that point?

A He indicated to me at that point that he was too upset to go back to the classroom and face the young people.

Q As of your last discussion with him on that day, did he say whether or not he was then prepared to accept Mr. Hinkle's apology or what, if anything, did he say?

A There was no further discussion on that.

Q All right. Now, was all this discussion behind closed doors in your office?

A Yes.

Q As far you knew, was anyone then aware of the incident besides the two people involved and Mr. Shell and yourself?

A As far as I knew, this was the only four people.

Q All right. And you indicated that you were going to refer the matter to Mr. Ralph, the superintendent. Did you then do so?

A Yes. When Mr. Doyle left I then proceeded to call Mr. Ralph and report the incident as I knew it and the facts as I knew them to him.

Q All right. Besides reporting it to Mr. Ralph, did you dis- [103] seminate information about this incident to any other person?

A No, I did not.

Q All right. Now, that, I believe the testimony is, was on a Friday. Tell us, if you will then, what occurred the following Monday.

A It was either the following Monday or Tuesday that as a result — and this is, of course, what happened at the high school — as a result of action or the decision made by Mr. Ralph, superintendent, there seemed to be some teacher reaction.

At approximately 10:30 in the morning, and, like I said, that could have been Monday or Tuesday; I don't recall exactly — two teachers approached me in the front office and wanted to call a teachers' meeting — it was about a quarter after 10:00, if I remember correctly — call a complete teachers' meeting of all the high school staff at 10:30 in the cafeteria.

Q Was any such meeting scheduled for that day?

A No.

Q The teachers were supposed to be doing what on that day?

A Teaching.

Q All right. Now, what occurred then?

A Of course, my concern was, you know, I am not sure we can make such an announcement, that we do have 1800 students in the building [104] and, you know, the education of these young people is very important and we shouldn't be disrupting this.

They said, "Well, we must call this meeting."

MR. SGAMBATI: Objection, your Honor.

THE COURT: Well, a ruling is going to be reversed on it. We can't tell now whether this is preliminary.

Q Go ahead and describe what happened at that point, Mr. Stragand. Was there a meeting held?

A There was a meeting held. At that present time I was slightly understaffed with one assistant principal at

the hospital picking up his wife; so it left 1800 students in the building for two hours with two administrators and no more than three or four other people in supervision.

Q All right. And was any teaching done of those 1800 students during those hours —

A None.

Q — that the teachers were meeting?

A None.

Q And what then occurred at the conclusion of those two hours?

A At the conclusion of those two hours it was decided by Mr. Ralph that we would call in the buses and send the students home the remainder of that day.

[105] Q. All right. Now, were you present at any time at this teachers' meeting?

A No, I don't recall that I was at all.

Q All right. Now, another matter which you were questioned about yesterday is what we might refer to as the cafeteria gesture incident. Tell us, if you will please, how you first learned of it.

A Through my assistant principal, Walt Peters.

Q All right. Now, did you get a report of this incident from Mr. Peters?

A Verbal report.

Q Yes.

A Yes.

Q All right. After getting a verbal report, at some point in time did Mr. Peters at the request either of yourself or Mr. Ralph formalize that report in written form?

A Yes, he did.

Q All right. I am handing you what's been marked for identification as Defendant's Exhibit Number 5, and I will ask you if you can identify what that is.

A That's the summary that Mr. Peters wrote up.

Q All right. Now, whether it was this written summary or whether it was an oral report, is Defendant's Exhibit 5 the gist of what Mr. Peters and yourself reported to the board and Mr. Ralph at the evaluation ses- [106] sion in March of 1971?

A Yes, it is.

Q All right. Now, I would like you to tell the Court in more or less chronological form what the report was that came from Mr. Peters and yourself to Mr. Ralph and the members of the board in March of 1971 about the gesture incident.

A It's hard to recall exactly, but I am sure that the indication to the board was that Mr. Doyle had brought these students to the office, indicated to Mr. Peters that there was a problem.

Q All right. As I understand it, the students had been guilty of some misconduct in the cafeteria to begin with?

A Yes.

Q All right. And was that reported to the board?

A Yes.

Q And then something occurred in the hall —

A Right.

Q — between the students and Mr. Doyle. Now, what was it that occurred in the hall and as it was reported to the board at the meeting in March?

A That as Fred was leaving the cafeteria or the snack bar area, [107] at the end of his responsibility and coming down the hall, that there was supposedly derogatory comments made to him. His name had been mentioned and so forth.

Q By these students?

A By these same students.

Q Who were, I believe, about four girls; is that —

A To my recollection, yes.

Q O. K. And I also believe you said that which year of the high school they were in you can't remember?

A No.

Q You can't remember whether they were freshmen or seniors?

A I couldn't say.

Q All right. Was it reported to the board just what they said to Mr. Doyle?

A We didn't know what they said.

Q He didn't know?

A We didn't know, and I am not sure that even at the time of the incident that this was reported to Mr. Peters what was said.

Q All right. In any event, they said something to Mr. Doyle, and what did he do?

A He turned — I guess he turned to them and gave them the gesture that we spoke of.

Q That's the gesture that I am demonstrating that you demonstrated [108] to the Court yesterday?

A Yes.

Q Now, there was some question yesterday about whether that gesture was understood by the students as being obscene or off color, and I believe you said something about that was shown by the reaction that the girls made; and I don't believe you were asked yesterday, "Well, what was the students' reaction to the gesture that Mr. Doyle made?"

Was it reported to you and did you and Mr. Peters then report it to the board and Mr. Ralph what the girls' reaction to Mr. Peters' —

A Yes.

Q — or Mr. Doyle's gesture was?

A Yes. We reported the full incident as it did happen.

Q All right. What was the reaction of the students, or at least one or more of them, to what Mr. Doyle did?

A I believe one student then returned with a different gesture, and that was the middle finger to Mr. Doyle.

Q You are raising the middle finger while making a fist with the other fingers of your hand?

A Right.

Q Now, are you aware of what that gesture is ordinarily understood to mean?

[109] A I am sure there could be a number of interpretations. I would say, to be quite blunt, it means "Screw you."

Q All right. Now, I believe the testimony was that Mr. Doyle then brought these students in to Mr. Peters?

A Right.

Q All right. And again, I am simply asking you to relate to his Honor what you and Mr. Peters related to the board. Now, what was told to the board about what occurred between Mr. Peters and Mr. Doyle when Mr. Doyle brought these students into his office?

A If I recall correctly, which I believe I do, Mr. Doyle approached Mr. Peters with the idea that "I did something that I feel we need get the students in. Here is the problem that exists."

Mr. Peters I think offered to take the case as it was and to discipline the students, or "Did Mr. Doyle want to talk to the young people?" And it was indicated to me that Mr. Doyle wanted to talk with them, which he did.

Q Was Mr. Peters present?

A Yes.

Q O. K.

A And from my understanding, Mr. Peters stayed out of it, except one point where one student was starting to show a little disrespect, where he interceded.

Q All right. And what did Mr. Doyle say to the students or what [110] did they do on the occasion of being present with them and Mr. Peters?

A He indicated to them –

MR. SGAMBATI: Your Honor, objection. This witness wasn't present during that conversation.

THE COURT: Well, I know, but there is a question of what was the basic reason the board took some action. Now, under that heading reports to the board would be relevant, whether true or untrue, would they not?

MR. SGAMBATI: I think that's generally correct. I didn't get the impression the witness was talking about the report he made, but more the incident as it occurred in asserting that this is how it occurred.

THE COURT: I think the questioning is limited to what was reported to the board that this witness heard; correct?

MR. O'CONNELL: That's correct, your Honor.

THE COURT: O. K., go ahead.

A (Continued.) Right. We reported to the board that Mr. Doyle did apologize to the young people in the light of the fact that "If that upsets you, I apologize to you for my action."

And there was also a discussion there in dealing with the fact [111] that, "You know, you did talk disrespective. You did perturb me to do this type of thing."

Mr. Peters, Mr. Doyle did himself handle the situation himself and Mr. Peters was there and did sit in.

Q All right. Now, as a school administrator and high school principal, would you agree that discipline is essential to the operation of a high school and that instruction cannot be adequately given if discipline isn't maintained?

A You can't operate without it.

Q And disrespect of teachers, of course, is something that should not be tolerated?

A You bet.

Q And is it also a fair statement to say, from your knowledge in education, that punishment and discipline must be meted out to students who have broken the rules, but with dignity and with respect?

A Yes.

Q Now, is it good teaching practice or administration practice to descend to the level of the students in disciplining them or in reacting to their misbehavior?

A Never.

Q What effect does that have when a teacher does that? What effect does that have on the ability of himself and the other teachers and ad- [112] ministrators to keep the students well disciplined so that they will be receptive to instruction?

A I think it destroys it.

Q And what effect, in your experience, does that have from the standpoint of maintaining respect for the teachers and respect for the administration on the part of the students?

A I think it hurts the situation.

Q And in your opinion would that be the result in the minds of those and other students of the gesture incident?

MR. SGAMBATI: Objection, your Honor.

THE COURT: Sustained.

Q All right. Now, I believe you testified yesterday that another matter that was reported to Mr. Ralph and the members of the board of education at the March evaluations was what we might call the S. O. B. incident?

A Uh-huh.

Q Now, tell us, if you would please, and in more or less

chronological order what was reported to the board about what occurred on that occasion.

A Mr. Peters and I sat with the board at evaluation time. We reported to the board that this incident also did happen where the thing was three or four boys had been removed from the snack bar for a period of time. I couldn't say exactly how long that had been.

Q Would they have been removed by Mr. Doyle?

[113] A Yes.

Q And apparently because they had been guilty of some infraction?

A Right. Right. They were wrong.

Q All right. Now, they then came to Mr. Shell?

A Right.

Q All right. This may have been covered yesterday, but I gathered that both Mr. Shell and Mr. Peters were your assistant principals at the time?

A Yes. Yes.

Q O. K. Now, what was Mr. Shell going to do with the boys? In other words, what was the board told about what Mr. Shell was going to do with these boys when they came in?

A We told the board that Mr. Shell was going to discipline these youngsters and was taking them down to talk with Mr. Doyle, to reemphasize with them what was expected of them in that area.

Q All right. Now, what happened then? Back up a little bit. What was the board told about what happened when Mr. Shell with these three or four boys approached Mr. Doyle?

A They were told that upon approaching Mr. Doyle, Mr. Doyle still, I guess, upset with these youngsters, did react to Mr. Shell and say, "Those little S. O. B.'s."

[114] Q All right. Now, let's move on then to anoth-

er incident that was touched upon yesterday and, for the lack of something better, let's call that the WSAI incident.

First, since his Honor's children are a little older than mine or yours, would you say what kind of radio station WSAI is and what programming content it puts on and what kind of audience it has?

A I would think it would tend to lean more toward the teen-age population.

Q All right. Do you agree that it's probably driven more parents half crazy than any other radio station in town so far as the content is concerned?

A That's possible. I don't know. (Laughter.)

Q O. K. Now, prior to the incident that you mentioned, I believe you testified that you had published some sort of memorandum on teacher dress code?

A Yes, I did.

Q All right. I am handing you what's been marked for identification, Mr. Stragand, as Defendant's Exhibit number 2, and I will ask you if you can identify what that is.

A That's a copy of my memo.

Q All right. And that's dated what day?

A February 8th, 1971.

[115] Q Was that disseminated to the teachers on or about that date?

A Yes.

MR. O'CONNELL: All right. If the Court please, I know we are not in our case yet, but I think it might be of asisstance to his Honor if you could see this.

THE COURT: Yes. Go ahead.

MR. O'CONNELL: Do you have any objection, Mr. Sgambati?

MR. SGAMBATI: No.

MR. O'CONNELL: (Handing.)

THE COURT: All right. Thank you.

Q Now, what was your reason in putting out that memorandum at the time you did publish it, Mr. Stragand?

A Well, there had been some concern at the time administratively about teacher dress and appearance and public relations.

Q All right. And did you have or were you contemplating — I shouldn't say you; I should say the board of education. As far as you knew, was it contemplating submission of bond issues to the voters in Mt. Healthy?

A That was constantly happening. It still is.

Q All right. And were efforts being made from time to time to maintain good public relations with the Mt. Healthy community so as to [116] build up a climate in which those bond issues would get acceptance by the electorate?

A In light of education and educating our young people, without a doubt that was very important.

Q All right. Now, was it felt by you and others to your knowledge that the Mt. Healthy community was of a certain kind, that it would or wouldn't be receptive to changes in dress and that sort of thing?

A At that point in time I think we were in a period of change in our community, fast growth, changing community; generally speaking, somewhat conservative.

Q All right. Now, would you say that acceptance by the public at large of such things as wearing of pantsuits by lady teachers was less acceptable than it is, for example, today?

A We were concerned about feedback.

Q All right. Now, with respect to Defendant's Exhibit number 2, the memorandum, was that published as an absolute final order, an "This is it" type of thing?

A Not really.

Q All right. Were you prepared to modify your position or make changes if persuaded to do so by teachers?

A Right.

Q Did you expect to get some reaction from some of the teachers?

A Yes, I did.

[117] Q And did you want such comments?

A I would have accepted these comments, yes.

Q All right. Now, how did you learn of the broadcast on WSAI, or when did you learn of it? I believe you said yesterday that someone, secretary or someone, mentioned it to you?

A I can't say for sure. It is possible entering the building the day that it was on the radio it was indicated to me, "Had you heard the radio that morning or the broadcast?" I said no, I hadn't.

Q And did you know at that time whether any particular teacher, Mr. Doyle or anyone else, had prompted the broadcast?

A No, I didn't.

Q And did you approach Mr. Doyle either that day or shortly thereafter and make an inquiry of him?

A I did. I can't remember exactly in relation to that particular morning.

Q Did you know at the time you questioned Mr. Doyle that he was the one who had called the radio station?

A I asked Mr. Doyle, knowing that he did know people at WSAI, if he had any knowledge of how they would have gotten this word, and he indicated to me that he had talked with them.

[118] Q All right. Now, as best you can recall, and again this is late date; it's rather difficult perhaps to remember the exact words that were used — but as best you can

recall it, can you describe to his Honor what you said on that occasion and what Mr. Doyle said on that occasion?

A I indicated to Fred that I was quite bothered by the fact that he would have done this without coming in and talking with me about it if he had a concern and to the fact that I felt we had always been on a fairly decent communicative level of being able to talk; that professionally I felt that not coming to me, that there was — I was bothered by this to the point that I felt that releasing things to the news media, releasing things to the public, that could have been handled in a better way, was of great concern and I felt — I was just bothered by the fact that he had not come and talked to me about it prior to making that decision.

Q All right. Now, when you made those statements, what did Mr. Doyle say to you?

A As usual, the times that I talked to Fred, he would be very understanding. He would say, "I understand what you mean. I understand your feeling. I should have come in and talked to you about it."

Q Did he say that on this occasion?

A Yes, he did.

[119] Q Did he say he was wrong in calling without talking to you first?

A He indicated that he should have come and talked to me, that he felt that, you know, with me approaching him, I guess in that manner.

Q All right. Did he say anything about what he would or wouldn't do in the future? Go ahead.

A Well, at that particular time I can't say.

Q All right.

A I had talked to Fred at times about actions and he indicated to me, yes, that he knew this was a problem and he was going to work on improving that.

Q All right. Have you ever said and did you say to

the board that you denied Mr. Doyle's right to make the call in the first place?

A No.

Q Now, assuming that there was some controversy or problem in the system with respect to dress code, in your opinion did the call to WSAI assist in resolving that problem or did it make it worse?

A I don't recall that it made it any worse or caused it to be resolved.

Q All right. Now, was what you just testified to the gist of what you reported to the board of education in March when you were in your [120] evaluation session with the members of the board and Mr. Ralph concerning Mr. Doyle?

A Yes.

Q And at some point did you put down onto paper your recollection of the incident?

A Yes, I did.

Q All right. I am handing you what's been marked for identification as Defendant's Exhibit number 6 and I will ask you to tell the Court what that is.

A That's my summary.

Q Now, I believe you testified yesterday that whether this was actully prepared before or after the evaluation session, you can't specifically recall?

A Around that time. It was in the spring.

Q But in any event, does Defendant's Exhibit 6 set forth the gist of what you reported to Mr. Ralph and the members of the board?

A Yes.

Q Now, I believe you indicated that the evaluation that was done in March of '71 was the same sort of thing that was done at that approximate time every year on every teacher?

A Yes.

Q And am I correct that the principal and the assistant principal of each school would come in and go over teacher by teacher each person in their respective building?

[121] A Yes.

Q I take it then that the elementary teachers weren't — or the elementary principals weren't present when you were giving your report and vice versa?

A That's correct.

Q All right. Now, when you came to this evaluation session in March of '71 did you know what Mr. Ralph's recommendation to Fred Doyle was going to be?

A No, I did not.

Q And from time to time during each school year did the principal have to make some sort of evaluation report on the teachers working under him?

A Yes.

Q All right. Now, I am handing you what's been marked for identification first off as Plaintiff's Exhibit number 16, and I will ask you to tell his Honor what that exhibit is, Mr. Stragand.

A That's teacher evaluation summary report.

Q And that's for what year?

A November 1967.

Q Now, there are several pages there. What are the other pages?

A It's the same.

Q But for other times during that school year. I notice the second page is February.

[122] A Oh, yes, February '68.

Q '68?

A And another one in March of '66.

Q March. O. K. Now, at that time — I may have a little confusion here. In 67-68, what sort of evalua-

tion system was being used insofar as what the numbers meant?

A It was a 1 to 5 rating scale. The evaluation form was broken down into areas of teaching, staff relations, teaching techniques and such; and the total composite score was listed categorically as strong, excellent, weak or average.

Q All right. Is that Mr. Doyle's evaluation form for 67-68?

A Yes, it is.

Q Now, were you the evaluator on that occasion or was your predecessor?

A Mr. Barnes.

Q And he was your predecessor as a principal?

A Yes.

Q For the record, what scores are shown on those three evaluations in the 67-68 years?

A 151, 155 and 162.

Q All right. Where does that stand in the —

A In the rating category, it would be strong.

[123] THE COURT: In the what? I didn't get that last answer.

THE WITNESS: Strong.

Q Now, I am handing you what's been marked for identification as Plaintiff's Exhibit 17. Tell us, if you will, what that is.

A That's a teacher evaluation summary report.

Q And for what year is that?

A '69 and '70

Q And for whom is that?

A Mr. Doyle.

Q Now, at that time it's obvious the form is different. What scale was being used on that occasion?

A Well, we moved from a 5-point scale to a 12-point scale.

Q And then you averaged them too, so that you come out not with a total score but with something between 1 and 12?

A Right.

Q O. K. Now, who was the evaluator on that report?

A It's not written on here. I see Mr. Barnes on 3-70.

Q And what scores are given on those rating forms?

A 7.7, 8 and 7.5.

[124] Q Is 8.0 the middle one?

A Yes.

Q All right. Now, where does that fit into the picture? Is that —

A Satisfactory.

Q All right. Now, I am handing you what's been marked for identification as Plaintiff's Exhibit number 18. I will ask you to tell his Honor what that is.

A That's the same, teacher evaluation and summary report.

Q And for what year?

A 70-71.

Q Now, that's the last year that Mr. Doyle was in the system?

A Right.

Q And who was the evaluator on those forms?

A Myself.

Q All right. And what composite scores, first off, is shown on the November 1970 evaluation?

A 7.7.

Q And what composite score is shown on the January evaluation?

A 7.5.

Q And where does that fit in?

A Satisfactory.

[125] Q All right. Now, there are spaces on those

reports for various comments under the heading "Characteristics needing improvement," and there are also headings for excellent characteristics. Is that correct?

A Yes.

Q First off, would you tell us what, if anything, you put down under the heading of "Excellent characteristics" for Mr. Doyle?

A Under excellent such things as "Consistent and accurate in fulfilling teaching duties and extra duties" and "Relates well with students." That's under — That would be classroom.

Q All right. And what else?

A And "Individualizes instruction."

Q All right. Now, under the heading "Characteristics needing improvement," what, if anything, did you note down on the evaluation form there?

A I questioned, "Reacts negatively, maturity was low," and I felt that he was led at times.

Q All right. And what else did you put down?

A Emotional and at times acting without a little prethought.

Q All right. Were these available to the members of the board —

A Yes.

[126] Q — at the evaluation? All right. Now, during the school year from time to time when unusual incidents occurred, either of a positive or a negative nature, would you advise Mr. Ralph of them?

A Periodically throughout the year, yes.

Q And with respect, for example, to the gesture incident and the S. O. B. incident; is that the sort of thing that you would have and did report to Mr. Ralph?

A If it seemed necessary, yes, I would.

Q Do you have a recollection of whether or not those two particular incidents were reported to Mr. Ralph?

A I don't recall that they were reported specifically.

Q The WSAI incident he didn't need a report from you on?

A No.

Q I gather he knew about that anyhow?

A Right.

Q At the evaluation session with Mr. Ralph and members of the board of education, I believe you testified yesterday that you or Mr. Peters or the two of you together went over the pros and cons of each teacher, including Mr. Doyle?

A Yes.

Q And with respect to Mr. Doyle, did you describe to the mem- [127] bers of the board and Mr. Ralph generally the same things that you have described here today and with respect to each of those incidents?

A Yes.

Q All right. Were questions asked of you and/or Mr. Peters and/or Mr. Ralph by the members of the board about Mr. Doyle?

A I am sure for clarification. I don't recall.

Q Was that usual? Would they ask that with respect to other teachers?

A Yes. Yes.

Q All right. And during that discussion, to your knowledge, at any time were Mr. Doyle's activities in the Teacher's Association the topic of any of the discussions?

A No.

Q All right. Was it mentioned by Mr. Ralph —

A No.

Q — or by the members of the board?

A No.

Q All right. Now, did anyone at that meeting to your recollection say in so many words that Mr. Doyle ought to be let go simply because he called WSAI?

A No.

Q Now, at the time I believe there were about 65 teachers in the high school?

[128] A I couldn't say for sure the exact number.

Q All right. And available to the board at that meeting was a composite evaluation and data form?

A Yes.

MR. O'CONNELL: Now, I believe your Honor has Joint Exhibit number 3?

THE COURT: Yes, I do.

Q Now, I am going to let you look at what is a copy of that, and I have got a copy here, Mr. Stragand.

I have done a little homework here, and maybe you haven't had a chance to do it. But of the 65 teachers, beginning with James Adams and going through to Aldona Zibas, I believe that there are 25 who have a score of either 7.6 or less.

Now, 7.6 would be the average of Mr. Doyle's two scores on Exhibit 18, would it not? 7.7 and then 7.5 would average, even though I am not a math teacher, would average out to 7.6; right?

A (Nodding.)

Q And on the evaluation form Mr. Doyle is number, in alphabetical order, number 21, is he not, on page 2? And in the heading "Evaluation" which is in the right half of the page, there are the three figures for the November and January evaluations and then an average of the two; and [129] the 7.7 and 7.5 averaged out there at 7.6, are they not?

A Yes.

Q And that's done for the other teachers, again in alphabetical order on Joint Exhibit number 3?

A Yes.

Q All right. Now, I would like to go through with you, Mr. Stragand, each of the teachers on this list who did not get a 7.6 and ask for your comments about each one of those and what happened to them and what evaluations were made of them to the board by you.

First off, the first one alphabetically that one comes to is Vernon Arne, number 3. He has a 5.0 score.

A Mr. Arne was released.

Q He was not renewed; is that correct?

A No; right.

Q The next one is number 4, Mrs. Corine Baisden, who has a 7.35. What kind of contract did she already have with the board?

A Continuing.

Q She had a continuing contract?

A Yes.

Q She was tenured in other words?

A Right.

Q And then we come down to Mr. Gayle Bates. That's a 6.7. [130] He is teacher number 6 on the list. What became of him?

A He was not renewed.

Q All right. The next one is Mr. Robert Berta, who had a 7.5. What can you say about Mr. Berta?

A I would say it was pretty much of a one-tenth — .5. Mr. Berta was just a second year teacher and, if we had the year before's scoring, I believe he probably improved.

Q All right. Improved from a lower score in the previous year?

A Right.

MR. SGAMBATI: Your Honor, I am going to object

to that last comment that he did improve. I don't think there is any evidence before us of his previous evaluations.

THE COURT: All right. O. K.

Q In any event, was Mr. Berta eligible for a continuing contract?

A No, he was not.

Q And was Mr. Doyle eligible for a continuing contract?

A Yes.

Q All right. Now, the next one would be number 10, Gloria Bitsoff, who got a 6.95.

A Gloria was a first year guidance counselor, first year in our [131] system, and was not renewed the following year.

Q The following year she was not renewed?

A Right.

Q The next one is Robert Brossart, who has a 7.4. What can you say about Mr. Brossart?

A Mr. Brossart taught in a special area, in handicapped youngsters, did an average job, didn't have any particular problems of concern, and that's it.

Q All right. Go on then to the bottom of the page, Miss Bush with a 7.4.

A Again, a beginning teacher, first year.

Q All right. I am going to the next page, a Mr. B. J. Cook, who got 7.3. What sort of contract was he already on?

A Continuing contract, and in the school system 21 years.

Q All right. The next one I have here is — We have got to go over to the next page to Betty Gellman, who is the second one from the top on the next page, with a 6.4.

A She was in her first year. We had already had a resignation from her.

Q All right. And then we come down to a Joyce Harville, 7.1. What can you say about this teacher insofar as —

A She was in her third year of teaching, and I know — I can't [132] recall any specific concerns with Joyce at that time.

Q Would you say that she was receptive to suggestions and assistance —

A Yes.

Q — that you had given her during the year?

A Yes.

Q All right. Then we come to Darryll Hinson, with a 7.0.

A There again is a teacher on a teacher tenure and continuing contract.

Q All right. The next one is over on the next page, about the fourth one down, Donald Kuhlmann with a 7.5.

A Don, of course, had been with the system quite some time. He was a good teacher for handling slow-type youngsters, related real well with low achievers.

Q All right. Would you say he was cooperative and receptive —

A Yes.

Q — insofar as the assistance that you had tendered to him during the year?

A Yes, without a doubt.

Q All right. The next one with a 7.6 or less is Frances Martin, fourth from the bottom on that page, with a 7.55.

[133] A Fran again was very receptive. I think you can see from her two scores that we saw at least some degree of improvement in that given year.

Q All right. The next one is at the bottom of that page, David Merkel, 7.4.

A Dave again was very receptive, very cooperative, doing a fine job.

Q All right. Over on the next page, Frances Mickey, with a 7.5.

A First year teacher.

Q All right. When it came to first year teachers in your comments to the board, were you inclined to take a different approach than with teachers with as many as five years' experience?

A Yes.

Q And what was the reason for that?

A First year teachers normally are going to experience some difficulties dealing with program, instruction, lesson priming. It could be discipline. It could be a number of things.

Q All right. The next teacher on here with a 7.6 or less is Mrs. Miringu with a 6.35.

A She was not renewed.

Q All right. And the next one is third from the bottom, Mrs. Richburg with a 7.4.

[134] A Mrs. Richburg was in her second year and was very receptive and was coming along pretty well at that point.

Q I believe it indicates she was really, insofar as the employment in the system is concerned, in her first year. She was employed on 8-27-70, was she not?

A Right.

Q Now, the next one with a less than 7.6 is Michael Rose with a 6.55. What can you say about him?

A A beginning teacher.

Q All right. Now, the next one is a Jan Shedd with a 6.9.

A Jan Shedd as a person is very receptive and very cooperative and she would do anything for you, rates well.

Q All right. The next one is Suzanne Suprock with a 7.5.

A In her first year.

Q All right. The next one is James Sutton with a 6.95.

A Jim taught chemistry. He was in his first year. The low score there, or the lower score than Mr. Doyle's, was basically because of at the start he was talking over the students' heads, but he started to master that.

Q All right. The next one is over on the next page, John [135] Thompson with a 6.7.

A Continuing contract and teacher tenure.

Q And the last one that I see on here is Betty Whitcomb, who had exactly the same score as Mr. Doyle, 7.6.

A First year teacher.

Q All right. Now, of this group of 25 then, if my figures are correct here, three were not renewed, eight were first year teachers, four were second year teachers, four of them were on continuing contracts. Does that jibe with your recollection of it?

A That sounds about right.

Q All right. Now, was there also one high school teacher who had a higher score than Mr. Doyle who was not renewed in 1971?

A I don't recall that.

Q How about Mrs. Holmes? She was not renewed, was she?

A She resigned.

MR. O'CONNELL: All right. If I may just take a moment, your Honor.

Q I don't mean to get into a dispute with you, Mr. Stragand, but I think Joint Exhibit number 1, which his

Honor has, would indicate that she was not renewed and thereafter resigned, but —

[136] A It could be.

MR. O'CONNELL: All right. I think that's all. Thank you very much.

CROSS-EXAMINATION

BY MR. BURKHOLDER:

Q I have just a couple of limited questions, Mr. Stragand.

You had testified in response to Mr. Sgambati's questions that your presentation to the board was both pros and cons. How did you view your responsibility to your teachers, including Mr. Doyle, in connection with those presentations?

A I felt a responsibility to the teachers and to the board to explain the pro and con the best I knew, to be fair.

Q Do you feel comfortable in the presentation you made to the board with regard to Mr. Doyle?

A I feel I was honest.

Q You were present at the board sessions in connection with the evaluation of all teachers, including Mr. Doyle; is that right?

A Yes.

Q Or all high school teachers?

A High school teachers.

Q Mr. Stragand, was there any consideration or any discussion [137] given by you or by Mr. Ralph or by any member of the board of education during those evaluation sessions of any matters other than the specific things that you have testified to yesterday and today?

A None that I recall.

MR. BURKHOLDER: That's all. Thank you very much.

RECROSS EXAMINATION

BY MR. SGAMBATI:

Q Mr. Stragand, directing your attention again to Joint Exhibit 3, which I believe you still have a copy of in your hands there, did you evaluate all of those teachers?

A Some are joint evaluations, depending on the department head or involving the assistant principals and myself.

Q Did you observe all of these teachers in their classroom?

A No.

Q Now, directing your attention to item 37, and I think that's on the third page of the exhibit, did you comment on Miss Helen Hirsch?

A Hirsch? No. I don't think we did.

Q Her evaluation was lower than Mr. Doyle's; is that correct?

A Yes.

[138] Q She had been in the system for three and a half years?

A Yes. This is a joint evaluative figure. If I might explain that, we have a department head of physical education, of which he is a P. E. teacher; and two people looking at a scale of 12 points many times see it differently; and this is a result of a combined, his evaluation and mine; and he tended to look at the scale differently than I did. That was Bud Thines, I believe.

Q How about Mr. or Mrs. Hobba?

MR. O'CONNELL: Who, please?

THE WITNESS: Who? Hobbs?

Q Is it Betsy Hobbs? That's about the same as Mr. Doyle's isn't it?

A Yes, first year teacher.

Q First year or second year?

A First year. First year with us.

Q I think –

A Second year with us. O. K.

Q O. K. When you testified that these were first year teachers, these aren't necessarily teachers who were in their first year of teaching as such?

A The first year of our experience with those people. Generally, it was the first year of teaching.

[139] Q They may have been in teaching for several years prior to that?

A In most cases it was the first year of teaching.

Q But there are cases, of course, that there were teachers who taught in other places?

A Possibility a couple of them.

Q Now, with the exception of Miss Hirsch, are there any other evaluations or any other teachers whose evaluations appeared here where you didn't participate or you didn't evaluate those teachers?

A That would take a great deal of research to go back and to assess all that on every one of these particular staff members, on who actually filled out ratings and had conferences with them. I couldn't answer that at this point.

Q Are you saying that in some of these indications other people may have written up the evaluation?

A Joint efforts, yes.

Q "Joint" meaning someone else determined what score was to be given to a particular teacher?

A As I indicated in light of Miss Hirsch, two people were involved with her rating.

Q How about Mr. Doyle? Weren't at least two people involved?

A Yes.

[140] Q Weren't at least two people involved in that?

A I couldn't go back and say at this point as of four or five years ago exactly what one or two people may have been involved with. All these evaluations, including Mr. Doyle, are pretty well indicated on the rating sheets.

Q Did Mr. Peters participate in the evaluation of Mr. Doyle?

A I couldn't say for sure. I couldn't say honestly.

Q But you do recall specifically some four years later to the attitudes of each and every one of the teachers you testified about on questioning by Mr. O'Connell?

A Yes, pretty much so. I think you deal an awful lot with attitudes.

Q You testified that several of these teachers were generally receptive and cooperative?

A Right. That's my interpretation.

Q Was there a reason for your description of them in that manner? Was Mr. Doyle uncooperative and unreceptive?

A Receptive – "Receptive" could have been questioned since certain adjustments maybe didn't take place.

Q How about cooperative? Was he cooperative? I believe your testimony reflects that your conversations with him certainly were cordial?

[141] A Each conversation did indicate a cordial conversation, yes, and a tone of cooperativeness.

Q Well, would you say Mr. Doyle was cooperative?

A In those situations I would say yes.

Q Well, were there any other situations where he wasn't cooperative?

A As it relates to adjustment on these particular problems, the attitude would be that, acting without a little prethought in handling situations definitely would happen.

Q Is that what you consider uncooperative?

A No. I am saying there was a cooperative attitude displayed along those lines.

Q Your testimony is that Mr. Doyle was cooperative?

A In talking to him about these problems he indicated a cooperative attitude, yes.

Q Well, during your other conversations with him on whatever topic, did he indicate also a cooperative attitude?

A No matter what topic, yes.

Q He did?

A Generally (nodding).

Q Was he receptive?

A Seemed to be receptive, yes.

[142] Q During all of your conferences with him and your conversations with him?

A Yes.

Q You were his principal for two years?

A Two years.

Q Mr. Stragand, I am handing you what has been marked for identification purposes as Plaintiff's Exhibit 15 and which you have already discussed in your testimony.

A Right.

Q Is that your handwriting?

A No. That's my secretary.

Q This is your words though, your appraisement of Mr. —

A She took this from my work sheet.

Q From your work sheet?

A Yes; the same type of sheet, only my handwriting is on it. It's not clear, not legible.

Q And this was done in November of 1970?

A 70-71.

Q And this was after the cafeteria incident with the students and the gesture?

A I couldn't say for sure right now.

Q Could it have been?

A It could have been.

Q It could have been?

[143] A Uh-huh.

Q And I believe your assessment of Mr. Doyle was "Relates well with students" in November of 1970; right?

A "Relates well with students."

Q Well, that does appear on your evaluation, does it not?

A No, but this was what was reported to the board of education.

Q This was reported to the board of education?

A (Nodding.)

Q I think you testified that those evaluations were available to the board of education. Do you know if they had them in their possession or reviewed them during your meeting with them?

A Not that I know of. We reviewed a composite sheet of all staff. We went through the entire teaching staff. I don't recall that there were present at that time.

Q Well, tell me, the composite sheet, was that a copy of Joint Exhibit 3 that you went through?

A Yes.

Q You went through this at the meetings —

A Yes.

Q — during March of 1971?

A Yes.

Q But you didn't go through the evaluation sheets?

[144] A No.

Q And I take it you didn't tell the board that you had thought Fred Doyle in November related well to students?

A Not in November.

Q Pardon me?

A Not in November.

Q Well, you didn't advise the board that his evaluation reflected that, did you?

A Pardon me?

Q I say, you didn't advise the board of your evaluation of Mr. Doyle in November of 1970, did you?

A Did I appraise them of these facts —

Q Yes.

A — that you say I wrote here?

Q Right.

A Yes, in the spring, but not in November.

Q Pardon me?

A In the spring, but not in November.

Q So you did advise the board of education then that in your opinion Mr. Doyle related well to students?

A Yes.

Q I believe you testified also on questions by Mr. O'Connell on the topic of the WSAI incident that you had expected some sort of reaction [145] from your staff when you put out that memo in February of 1971. What reaction did you expect?

A I guess prior to putting that out, knowing that there was some question in their mind as to anything dealing with dress — and there were some staff members I think that had some concern about dress — I thought that there would probably be some reaction to my memo, yes.

Q Isn't it a fact that in fact dress code was a topic of conversation amongst teachers and between the association and the administration at that time?

A I don't recall that that was a big concern between administration and the staff at that time.

Q There was some concern over dress code at that time, was there not?

A Yes. Yes, there was. I wouldn't have put out the memo if there hadn't been.

Q The concern I am talking about is teacher concern as expressed to you.

A I don't recall any specific concern expressed to me prior to that by the teachers at this point, no.

Q But you did expect a reaction, and I expect that that reaction was in your mind going to be a hostile one or certainly one of some concern?

A I could and did expect some reaction from a few people, but [146] I did not expect a reaction from the majority of the teaching staff of that high school.

Q Did you get a reaction from a majority of the staff on your memo?

A No.

Q Did you consider the possibility of calling a staff meeting of teachers to discuss the problem before you put out your memo?

A I don't recall that I did.

Q Was it your intention in putting out the memo that it would warn teachers of what they should not wear?

A Not necessarily. I did allude in the memo to some specifics — I know that — more for clarification than anything else. My main concern was in our situation at that time dealing with financing education, bond issues, creating any backlash from our community from the standpoint of public relations and dress and appearance and personal image.

Q You were concerned about public relations to teacher dress?

A I was expressing to the staff that I felt that these are things that we needed to keep in mind at a time when we were trying to support education in Mt. Healthy, which was extremely difficult, and that we should be con-

cerned about our dress. I did state examples of the types of things that I was referring to.

Q Did you check with Mr. Ralph or any of the board members [147] prior to —

A No, I did not.

Q — distribution?

A No, I did not.

Q Had Mr. Ralph talked to you about a dress code for teachers?

THE COURT: What has that go to do with this case?

MR. SGAMBATI: I will withdraw that question, your Honor.

Q Speaking again of public reaction, had there been any reaction to the Teacher's Association in the community?

A I don't understand exactly what you want me to answer to there. I didn't quite get that.

Q Well, you said you were concerned about public reaction to the dress of teachers. What I am wondering is if you knew of any public reactions for the Teacher's Association or their activity, such as the Hinkle incident?

A Oh. O. K. I would say that I don't know of any overall public reaction because the Teacher's Association was a teachers association. That's what I thought you were saying. But as far as the Hinkle incident, we had quite a few reactions from the public at a point where we had to send pupils home and had teachers not in the classroom fulfilling their [148] responsibilities, yes.

Q Isn't it a fact that the bond levy, say in May of 1970, that failed, did it not?

A I couldn't verify that at this point.

Q O. K. You testified earlier that you had expected teachers to come to you if they felt any concern about the amount of food they were receiving in the cafeteria?

A Right. That is correct.

Q Had any teachers come to you?

A I don't recall. I don't recall offhand.

Q Was there some problem with proportions of food the teachers were receiving?

A Oh. Oh, there had been some discussion earlier I believe, you know; the proportions aren't large enough. This was discussed with Mr. Ralph and he did discuss it with the cafeteria staff and indicated to us that it should not be any problem, which we in turn told back to our staff, that this had been discussed and it was taken care of and it shouldn't be a problem and, if it is, we should hear about it.

Q You indicated that Mr. Doyle — or that it was your opinion that the school could not operate without discipline?

A Right.

Q Did Mr. Doyle have any disclipine problems that you were [149] aware of, say, in the classroom?

A I wasn't directly involved with classroom discipline at all, really. My assistant principals handled that, mainly Ralph Shell. So if there were discipline problems in a classroom, I didn't know of any big problems. Mr. Shell would have been the person at that time which would have mainly dealt with discipline problems, classroom.

Q Well, at least on one occasion he did come to you about a remark which Mr. Doyle allegedly made; right?

A Yes.

Q Mr. Shell came to you with no information relative to any other or any disciplinary problems relative to Mr. Doyle?

A Right. I don't think he would have approached me on every little discipline problem or every discipline problem that occurred.

Q I believe it's your testimony also that during the meeting with the board of education and Mr. Ralph the associational activities of Mr. Doyle were not discussed?

A I don't recall any discussion anlong that line.

Q So it's your testimony that if they were discussed or considered you were not aware of them?

A I am not aware of it; no, sir.

* * *

[151] **Frederick William Doyle,**

plaintiff, called as a witness on his own behalf, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. SGAMBATI:

Q Will you please state your full name?

A Frederick William Doyle.

Q Where do you reside, Mr. Doyle?

A Route 1, Jeffersonville, Ohio.

Q Are you the plaintiff in this action?

A Yes.

Q Are you married, Mr. Doyle?

A Yes.

Q Do you have any children?

[152] A One, one on the way.

Q Are you presently employed?

A Yes, in the Miami Trace school system in Washington Court House.

Q And in what position?

A As a guidance counselor.

Q How long have you been employed by Miami Trace?

A The last three school years.

Q That would be beginning with the 71-72 school year?

A Yes.

Q And you have been employed as a guidance counselor during that period of time?

A Yes.

Q Were you ever employed by Mt. Healthy?

A Yes, for five years.

Q And which school years were involved?

A '66 through '71.

Q In what capacity, Mr. Doyle?

A As a business education teacher.

Q During your years with Mt. Healthy did you participate in any extracurricular related -- school related activities?

A Yes, all five years I was there. The first school year I was [153] not assigned a specific extracurricular activity and, as a result of my student teaching I became aware of a club called the Future Business Leaders of America. I felt that this was a very good club and there was not a club of that nature in Mt. Healthy. So we had several meetings with students who felt they would be interested and they organized that under my direction.

Q How long did you serve as an advisor to that group?

A The remainder of the time I was there in Mt. Healthy.

Q For approximately five years?

A Yes.

Q Would you tell us some of the projects, some of the activities that you performed relative to your duties as advisor to the club?

A One of the big purposes of the club was to help students become more aware of business occupations, and one of my pet things I guess was service to others; and so we tried to combine both of these together.

Just running through very briefly, we had a very good service project. One was the Clovernook Home for the Blind, where for several years we took two weeks out of the year in between the hours of 6:00 and 10:00 in the evenings. We would, the club members and myself, [154] go down to the blind home and work with the people down there; reading letters, writing letters, talking to them, taking them to places, taking them swimming, taking them to the store; that type of thing. And this really helped the students understand a blind person also.

Another service project was working with the Mt. Healthy Christian Home there in Mt. Healthy on one of the holidays. The students volunteered under my direction to go to that Christian Home and do about the same type thing we did at the Clovernook Home for the Blind.

Another project included money-making and fun type things; like after the game dances which, of course, involved many hours, building floats for homecoming. We did that the last three years. And the time involved there — an adult had to be present — just countless number of hours. I guess they paid off because the club received a few first places and one second place in those.

Other events included — This was one of our main projects, was a scholarship day at Frisch's. The students actually took over the operations of Frisch's Restaurant.

They really enjoyed this. They learned a lot about the business and they spent many hours in training and also during the actual day of working, once again putting in a lot of time for others because the [155] money that was received, both through the tips they received and the money that Frisch's would give us that day, went entirely to scholarships.

Also the applications and procedures for working with

students who were interested in applying for the F. B. L. A. scholarship took a lot of time.

Q These activities, you say, occurred over the five years that you were there?

A Yes.

Q Under your direction and your suggestions, many of them?

A Yes.

Q Would you estimate for us approximately how many hours per school year you spent on this particular activity?

A I have given that much thought because sometimes I felt, you know, I was giving too much time to school, and I set down several times just to make sure that it was at least 300 hours a year just in F. B. L. A.

Q Were you paid for that?

A No. I didn't expect to be. I enjoyed it.

Q Did you participate in any other school-related activities other than your classroom teaching services as well as your services as advisor to the F.B.L.A.?

A Also one more thing about F. B. L. A. The last year I was em- [156] ployed at Mt. Healthy, there is a group called Inner Club which works with all the — it's a controlling body of clubs there at Mt. Healthy. They voted F. B. L. A. a model club that other clubs should look up to and follow as an example.

Yes, there were other activities, extracurricular. One was paid. It included being business manager of the Hoot and Holler, which is the school newspaper, which I assumed this. I would talk about the finances regarding this. A lot of the money for the paper came from ads and also from the general fund of the high school. But in previous years it had been in the red, and I was to try and get it back on a better financial position, which —

Q And did you?

A Last two years I was there it was in the black. Did you want me to continue?

Q No. Well, were there any other activities that you performed, school-related that is?

A O. K. I guess this was an outgrowth of my involvement with the Mt. Healthy Teacher's Association; but in trying to work with the school board, we tried to involve as many people as we could in passage of tax levies.

I worked with Mr. Carl Odell in the Future Teachers of America club in having students man the polls and pass out literature, [157] and I think this occurred in June — during the summer. And, of course, I would go to the various polls and make sure the students had plenty of literature and that they were doing O. K. and that they weren't getting bored and that they were manning their stations. And this was strictly voluntary on their part also; they wanted to do it.

Q Now, were you also involved in community affairs at Mt. Healthy while you taught at Mt. Healthy?

A Very much so. In fact, I was a member of the Assumption Catholic Church there in Mt. Healthy and, as a result of that, I was assistant scoutmaster for the Boy Scout troop with Assumption Parish, and also Explorer advisor.

Q And for how long did you participate in the scouting activities?

A Those were the last two years I was in Mt. Healthy.

Q Did you have any children in those programs at the time?

A Did I have any children?

Q Yes.

A No. I wasn't married.

Q How old is your one child?

A He is 20 months.

Q During the five years you were at Mt. Healthy would you review for us your contract status during each of those years?

[158] A O. K. The first three years were one-year contracts, and I had a two-year contract.

Q So the 1966-67, 67-68, 68-69 school years —

A One-year contracts.

Q — they were one-year contracts?

A (Nodding.)

Q And then you were extended a two-year contract to cover 69-70 and 70-71?

A After I asked for it.

Q You did ask for it?

A I had to.

Q And you did receive it?

A Yes. I felt if I was eligible for merit pay I should at least get a two-year contract.

Q Well, that brings us to the next topic. During your years of teaching at Mt. Healthy were you ever commended by the board or the administration, that is Mr. Ralph, for your teaching abilities?

A Well, before that it would be Mr. Barnes, the principal. He several times in discussing my evaluations felt I was a strong teacher and he was proud of the work I was doing with F. B. L. A., and he commented several times on my performance in the classroom and outside.

Mr. Stragand also in conferences told me that he thought I was doing a good job in the classroom.

[159] Q Did you receive a commendation?

A Yes. I received one from the board of education through a letter from Mr. Ralph stating that — Well, I don't know exactly what it said, but it was a commendation.

Q Handing you what has been marked for identifica-

tion purposes as Plaintiff's Exhibit 15, is that a copy of the letter?

A Yes, that is.

Q What does the letter refer to?

A That I have been selected by the board of education to receive its award of commendation for excellent rating as a teacher in the service to the Mt. Healthy schools during the 68-69 year and that I would also be receiving an additional increment in salary as a result.

Q Did you receive a copy of that letter?

A I received the original.

Q Of the letter?

A Yes.

Q You received an increase in pay as a result of the commendation?

A Yes.

Q Could you explain to us what the increase was?

A Well, for example, if you were on the fifth step for the next [160] year you would go up to the sixth step instead of the fifth step.

Q You are referring to the salary schedule?

A Yes, on the salary schedule. So it would put you up one step more than you would normally be otherwise.

Q So it would be similar as if you had another year of teaching experience?

A Yes, for pay purposes, yes.

Q Now, that was for the 69-70 school year; is that correct?

A Yes. Well, but it also continued thereafter; each year you would still have that additional increment.

Q So for the 1969-70 as well as the 70-71 school year you received this increased increment?

A Yes.

THE COURT: What's the date of that?

THE WITNESS: June 11, 1969.

MR. SGAMBATI: Plaintiff offers Exhibit 15, your Honor.

THE COURT: Admitted.

(Plaintiff's Exhibit 15 received in evidence.)

MR. SGAMBATI: Your have a copy of that?

MR. O'CONNELL: (Nodding.)

Q Mr. Doyle, during your five years at Mt. Healthy and in specific referring to the first three years, were the teachers represented by any association or was there a teachers' association or an association of teachers?

A There was an association called the Mt. Healthy Education Association.

Q And was that for the first three years of your —

A About three and a half.

Q Were you a member of the Education Association?

A Yes.

Q Did you hold any offices in the Education Association?

A Yes, I did; president elect and president.

Q And when was that?

A President elect would have been the third year, which was 68-69 — yeah, 68-69, president elect; and 69-70 as president. Is that right?

Q 68-69, was that the full year?

A O. K. It was the last half of the year because the previous president elect had resigned for personal reasons.

Q Who was president that year?

A Cecil Roebuck.

Q And what position did he hold with the school system?

A He was the principal of South Junior High School.

[162] Q He was a principal and he was president of the association?

A Yes.

Q Did that association, if you know, have a constitution?

A It did have a constitution.

Q I hand you what has been marked as Plaintiff's Exhibit 1 and ask you if you can identify it for us.

A Yes. That is the constitution of the Mt. Healthy Education Association.

Q When did you assume the office or the duties of president of the Mt. Healthy Education Association?

A At the end of the 68-69 school year.

Q Did you participate in any activities during the summer of 1969 in relation to the association?

A Yes. I felt that for me to do an effective job with the Educational Association as president, I needed to learn as much as I could about this type of thing. So as president I was automatically required by the Education Association to coach in the N. E. A. convention, which that year was being held in Philadelphia. They also requested that I attend the O. E. A. convention that fall; and also in August, Kent State Leadership Conference, which was a standard procedure for all presidents to do.

Q Did you participate in anything else? Did you make any surveys [163] that summer?

A Well, I did make a survey of all the surrounding school districts in regards to the salaries of their school districts, the accumulated sick days, personal leaves, hospitalization, things of this type.

I also rewrote the constitution of the Mt. Healthy Education Association as a proposed revision, which I knew that I just couldn't do this on my own, and it would have to be approved by the teachers because I felt like the association — well, I mean the purposes of the Mt. Healthy

Education Association as listed here don't even say anything about students, you know, if we can help them.

Q If I may interrupt or, going back to the survey that you took, did you eventually publish the survey?

A Oh, yes. It was handed to all staff members of the Mt. Healthy Board of Education. It was handed —

Q I am going to hand you what has been marked for identification purposes as Plaintiff's Exhibit 2 and ask you if you can identify that?

A Yes. This is the survey. It's about six pages long.

Q Is there a letter that appears in front of that?

A Yes, there was a cover letter.

Q And what did you do with that survey?

[164] A It was given to all professional staff the first day of school in '69 at the regular teacher meetings.

Q And correct me if I am wrong, but that shows a comparison of all school systems, including Mt. Healthy, with respect to salaries paid by teachers and benefits received by teachers?

A Yes.

Q Does that reflect the Mt. Healthy teachers were receiving less than other teachers in the area —

A Yes, it did.

Q — as far as salary and fringe benefits?

A Yes.

Q You say this was circulated to all association members; is that correct?

A It was circulated to all, not just association members; it was circulated to principals, administrators, teachers, librarians. Anyone that was there could receive a copy of it.

Q I believe you also testified earlier that you did some work on the constitution during the summer of 1969?

A Yes.

Q Can you explain briefly what you did with respect

to the constitution of the Mt. Healthy Education Association?

[165] A O. K. I rewrote the constitution because I felt, in talking to other teachers, that it was a social — it was a social organization primarily at that time and that it wasn't doing the job that it should be doing to help the school system and the students in that school system.

Q Did you submit a written revision to the association?

A Yes, I did.

Q I am going to hand you what has been marked as Plaintiff's Exhibit 4 and ask you if you can identify that for me, please.

A O. K. Yes, this is the one I worked on that summer.

Q And to whom did you submit that?

A This was also submitted to everyone at that meeting, just like the survey was.

Q What changes did you include in that constitution, changes from the Educational Association constitution?

A O. K. Of course, the name was the same. I felt the purposes should state primarily what we were there first. Where the old constitution started out with "To Improve the professional, economic and social status of teachers," it never mentioned anything about the welfare of school children. I felt this was the primary thing.

And in the proposed revision, that's the first thing we said, [166] "To work for the welfare of school children, the advancement of education and the improvement of instructional opportunities for all."

Don't get me wrong. I also felt that, from my experience the first three years, that there were things that were being stopped at the administration level. And so there was also included in this "To enable members to speak with a common voice on matters" because I felt teachers had a lot to add to a school system.

We even tell our students in classes that, you know, why we get them in groups, to brainstorm them, because that's where you get a lot of ideas. And I didn't feel like, from what I could see, that this was happening, you know. A lot of decisions were being made by administration and board without a lot of say-so from the teachers, and I felt this was very important.

Q During the years of the Educational Association the principals, the administrators and, in fact, the superintendent, were members of the Educational Association; correct?

A Yes.

MR. BURKHOLDER: Your Honor, I object to this line of questioning. The relevance is not particular, why Mr. Doyle made certain changes in the Education Association constitution, things of that nature.

[167] MR. SGAMBATI: If I may be heard —

THE COURT: Probably so, except it gets relevant. We can't understand. You can't understand it without this background, we don't suppose.

MR. SGAMBATI: I think that's probably the primary reason for the presentation as it is to have some starting point, as well as to develop the activity of Mr. Doyle, since obviously that's important here, is what activities he participated in.

THE COURT: Go ahead.

Q What other changes did you incorporate in that constitution that you submitted?

A O. K. Under the proposed revision everyone was eligible for membership, either as an active member or an associate membership. However, once again, we were trying to police our own ranks and encourage teachers to get off of temporary certificates.

So to become an active member of the association it had

to be a professional personnel who were on the Mt. Healthy teachers' salary schedule, and only those who had earned a bachelor's degree or higher. All of the members, if they were on a temporary certificate or if they were not on a teachers' salary schedule, they were to be an associate membership who could still have rights and responsibilities of active members, except [168] the right to vote and hold office or to represent the association as a delegate.

Q You did submit that revision then or the proposed revision to the association?

A Yes, I did.

Q Mr. Doyle, was the constitution eventually amended, that is the constitution of the Education Association?

A Yes. There were several changes made through September, through December, by the representative assembly of the Teacher's Association.

Q When did that become effective, the changes?

A It seems like it was in December of that year, '69.

Q Handing you what has been marked for identification purposes as Plaintiff's Exhibit 3, can you identify that document?

A This is the final rewritten thing as approved by the representative assembly.

Q And what changes were incorporated in that, that is changes from the previous Education Association constitution?

A You mean the proposed revision of the Education —

Q The Education Association.

A O. K. It incorporated several of the changes— well, most of [169] the changes in the proposed revision, but it included additional ones also.

Q Was the name changed?

A Yes. The name was changed to Mt. Healthy Teacher's Association.

Q And were principals and administrators excluded from membership?

A Yes, they were.

Q Mr. Doyle, did you ever have any conversations with Mr. Rex Ralph, the superintendent of schools on the constitutional changes that you were reviewing?

A Yes, I did.

Q How did those conversations come about?

A Well, there were several times I was called to Mr. Ralph's office concerning the constitution.

Q Do you recall about when that was?

A Well, they were between September and December, several times. One of them —

Q You say you were summoned to his office, called to his office?

Q Was this during school?

A It was always after school.

Q And what, if anything, did Mr. Ralph have to say about the con- [170] templated revisions of the constitution of the association?

A Why, I believe his main concern was that he wanted to be sure that if there were any changes that this is what the teachers wanted to do. He did express concern that things had gone by pretty good so far and that before anything could be done he wanted to have the feeling that this is what the teachers wanted.

Q Could you approximate for us how many times you were called to Mr. Ralph's office to discuss these changes?

A I can think of at least three. There may have been more.

Q Were there any further things discussed? Did Mr. Ralph say anything else?

A Yes. When we were going through the revision to the representative assembly, we got into — We just went

straight through it. Some parts we bypassed because we knew there would be some problems, and there were some polls that we felt it would be important to go back to all of the teachers in regards to; and those dealt with who exactly would be in the Teacher's Association or — excuse me — in the Education Association it was at that time.

And so we did go back — Mr. Ralph felt this was important also; we did likewise — to get a poll of all staff members, not just teachers.

[171] Q And what did your poll reveal?

A Well, it had several breakdowns to it. It listed each —

Q Did it reveal the teachers supported the changes?

A Well, overall, yes. It was over two-thinds, yes.

Q Now, at that time had the Education Association, if you know, been recognized by the board as the representative of teachers —

A O. K.

Q — during the change?

A O. K. The Mt. Healthy Association had a negotiations agreement with the board of education.

Q Now, did Mr. Ralph make any comments to you during these meetings that you referred to before regarding recognition?

A When it became aware to him that the name had been changed to the Mt. Healthy Teacher's Association, I was called to his office to make sure that we weren't getting into something that would get us in any trouble with the board of education.

He felt like it was a different group; it was not the same group as the Education Association, and he felt that way because it did exclude administrators.

[172] He felt that the Education Association had a negotiations agreement that we could negotiate for all staff members, and he felt that as a teachers association that

only had membership open to just teachers and just teachers with bachelor's degrees, that we could not possibly negotiate for teachers on temporary certificates or any administrators.

So he felt that these were some major changes and he was not sure whether the board would assume that we had the same negotiation agreement in effect or if we would have to renogiate that.

Q Well, is it your opinion based on the conversation that there was some concern there of Mr. Ralph?

A Yes, there was; and through the conversation I sort of felt some fear as a result of changing its name to the Teacher's Association that we may be in some problem, you know, as a result —

MR. O'CONNELL: Object to what the witness felt.

THE COURT: O. K. That's sustained.

Q Did Mr. Ralph direct you to do anything relative to the changeover from the Education Association to the Teacher's Association?

A Yes. We had to, as a result of this conversation, we had to go back to the teachers and take a poll of them to see how many would sup- [173] port the new organization, as he called it, the Mt. Healthy Teacher's Association.

Q Did you have to do anything regarding the funds of the association —

A Yes.

Q — the existence of the old and the commencement of the existence of the new?

A Yes. The advice he had given was that we should probably, for legal purposes, disband the Mt. Healthy Education Association and immediately start the Teacher's Association, you know, representative assembly meeting.

Q Did you have any communications with the board

of education relative to the commencement of business of the Teacher's Association?

A Yes. As president I attended all board meetings and at this particular time Mr. Ralph felt that I should – I believe he placed me on the agenda in a January meeting to discuss to the board the new constitution and try to get their approval of it, that we could work together in that negotiations agreement that was in effect would simply be changed by deleting "Education" where it applied and inserting "Teacher's."

Q You attended the meeting?

A Yes.

Q Did you speak to the board of education?

A Yes, I did.

[174] Q Were you asked any questions by the board of education, by any specific members of the board of education relative to your new organization?

A Yes. Several members did ask questions concerning the constitution and its purposes.

Q Anything in particular that you can recall by way of the questions asked you by the board of education, if you can recall which member spoke to you?

A O. K. They expressed the same concerns as Mr. Ralph did. The president, Mr. Morris, was I felt very concerned about the purposes of the Teacher's Association in that we not become a union as such.

Q Did he say that?

A Yes, he did.

Q Did he say why he didn't want you to become a union as such?

A From what I could understand, apparently he didn't feel like there was a place in school systems for unions. I guess he was referring to labor unions as they are in

industry. And I tried to assure him that I didn't feel like this is what we were trying to do.

Q Was the Mt. Healthy Education Association eventually – or Teacher's Association; excuse me – eventually recognized by the board of education?

A Yes, it was.

[175] Q Do you know appriximately when that occurred?

A January of '70.

Q January of 1970?

A Yes.

Q And you were still president at that time; correct?

A Oh, yes, uh-huh.

Q Did the association participate in any association activities during your term as president?

A Yes. Starting in January, I believe right after we got approval of the board for the name change, we started – it seems like it was the middle of January, 15th or something like that.

Q Were there any internal activities in the association prior to that time respecting negotiations?

A Yes. In addition to rewriting the constitution, we continued on the other functions of the Education Association; and one of those included a committee which dealt with improvements with teachers' working conditions and things of this nature.

And, of course, they worked with the survey that I had presented to them. Of course they did a lot more research also in regards to salaries and fringe benefits.

Q Were there any studies made of the financial records of the Mt. Healthy Board of Education?

[176] A Well, this was some of the difficulties we did have with the board of education and Mr. Ralph. Trying to get this financial information was very difficult.

Q Who, if anyone, approached Mr. Ralph or the board relative to getting financial information?

A I as president did.

Q Did you meet with Mr. Ralph?

A On many occasions, yes.

Q Would you tell us what your purpose was in meeting with Mr. Ralph?

A Well, I assume it was getting financial information. It was that purpose and that purpose alone that I went over to his office and, while he didn't — kind of hard to say. He would always say that, you know, the information is here and it was of a technical nature, that when we actually sat down at the table he would go over this information with us and help us with it, that we really didn't need it.

Q What was your position?

A That I felt that we did need it. We needed to see the full budget so that we could make up our own mind and so that we could go to negotiations talking intelligently.

Q How many times — Could you approximate how many times you met with Mr. Ralph concerning these particular records?

A O. K. There was also a problem of getting agendas to board [177] meetings because there were things discussed at board meetings that concerned teachers, and we were having difficulty getting that also; and so at the same time I was trying to get that also. We eventually worked it out.

It seemed to me like there had to be at least 10 times that I went to Mr. Ralph's office between September — or even during the summer I went for some information — to get this information, and even talked with O. E. A. representative, asked, you know, because the attempts were

so futile; and he visited Mr. Ralph to get this information and showed them a copy of the law which Mr. Ralph I am sure was aware.

Q You say on at least 10 occasions you visited Mr. Ralph's office though with respect to this access to records; correct?

A Yes.

Q And you met with Mr. Ralph on each and every occasion?

A Yes.

Q Was this during school, school day?

A No; it was after school.

Q On all occasions?

A Yes.

Q Did you ever receive a written communication from Mr. Ralph on his position on the records?

A O. K. Since I wasn't meeting much success with verbal [178] attempts, I wrote a letter to Mr. Ralph and, of course, I discussed it with several board members also; and as a result he wrote a letter back saying that the information was available and where I could obtain it.

Q And this occurred sometime after many meetings with him?

A Yes.

Q Handing you what has been marked for identification purposes as Plaintiff's Exhibit number 5, could you identify that for us?

A Yes. That was a letter I received from Mr. Ralph.

Q And you say that letter expresses that you could get access to some of the records?

A Yes, it said we could, yes.

Q Well, the date on the letter again?

A December 18th, 1969.

Q Were you able to obtain the records thereafter?

A While we were able to obtain it, it wasn't as easy as it sounds. We still met some resistance. We obtained most of the information. I think it bothered us that we were going to be charged for the information because we felt that's the least that the board could do for us.

MR. O'CONNELL: If the Court please, I object to that answer [179] and move it be stricken, about what they felt, what bothered them.

THE COURT: O. K. It's sustained.

Q Mr. Doyle, you said you were going to be charged. Did someone tell you that you were going — When you say charged, you mean you were going to have to pay?

A Pay, yes. Mr. Ralph did.

Q Mr. Ralph said you would have to pay?

A Yes.

Q Pay for what?

A For copies. He felt they were of substantial amount, that the secretary's cost involved in getting all this research work done for the Teacher's Association, and also — but I think they were only going to charge for the paper, you know, that was going to be used to run it off. Eventually we did not have to do that.

Q Did you eventually, after receiving this information, commence negotiations with the board of education or the administration?

A We did with the administration team.

Q Do you recall when that began or when the first session occurred?

A It seems like it was the middle of January.

Q Of 1970?

A Of 1970.

[180] Q Who represented the Teacher's Association at that meeting?

A O. K. It was Bruce Henn, Jeff Juett and myself, yes.

Q Did you hold a special position with the negotiating team?

A I was elected as the chief negotiator.

Q And who attended on behalf of the board of education?

A O. K. Mr. Bert Barnes was to be the chief spokesman for that group. Mr. Merle Hartzler was the business manager and Dr. Darwin Keye. Mr. Ralph was also present as a resource person.

Q What was the purpose of that first meeting in January of 1970?

A To go over the proposals made by the Mt. Healthy Teacher's Association to the board of education.

Q What position, if any, was stated at that meeting by the board of education representatives?

A O. K. Well, also I guess the purpose was to inform us as to the roles of the administration team. Of course Mr. Ralph would be a resource personnel. While he wouldn't actually be involved with the negotiations, he would be there if needed. That was also explained; and also to just generally comment on our proposals. They did say that they would [181] have to go and look at these in more detail. They had some questions they asked us about each individual one.

We did explain to them that we would have a more detailed package later on, but these were just nine items that the teachers had expressed concern about.

Q Were there any other or subsequent meetings on those nine items?

A Yes. It seems like the meetings were about a week apart in the last two weeks of January.

Q Do you recall how many meetings there were?

A Well, there were those three meetings and there were 10 other meetings with a new administration team.

Q Focusing in on the first three meetings, those occurred in January?

A Yes.

Q Who attended? You testified about the first meeting. Did the same people attend the next two meetings?

A Yes. Yes, they did.

Q Who spoke for the board of education at those next two meetings?

A Mr. Ralph.

Q And who spoke for the association?

A I did.

Q What was the position, if any, of the board of education relative to your proposals?

[182] A O. K. They came back with another set of papers saying that three of the items that we had proposed were not negotiable, that we could not even talk about them.

Q Do you recall what items those were?

A It seems like they dealt with the grievance procedure, parent-teacher conferences — I may be wrong but it appears that these are — and accumulated sick leave.

Q You are saying it was the position of the board spoken by Mr. Ralph that these items were not negotiable?

A Well, I think this was an administrative decision; and this is where our team stated that this was the whole reason why the Teacher's Association or Education Association was ever changed because we felt like things were stopped at the administrative level, and here once again is a perfect example of it.

Q Well, tell me, Mr. Doyle, was this position stated at the meeting —

A Yes.

Q — or the meetings?

A He said that we would not talk about these items; they were not negotiable.

Q He, meaning Mr. Ralph?

A Yes.

Q Was there any other differences of opinion expressed at these [183] meetings?

A Well, it was just basically trying to get negotiations going. We were all new to it. Of course, my idea of negotiation I guess was different than theirs in that negotiations are discussions using fact and reason. I didn't feel like we were doing this.

Also there was a disagreement as to the administrative team having authority to make commitments for the board of education. The Teacher's Association, we did have authorization to make commitments for the Teacher's Association. And it was very hard, we felt, to negotiate with a team that could not make a commitment for the board. They had no authority.

Q You were advised that they had no authority?

A Yes.

Q By whom?

A Mr. Ralph. Mr. Ralph informed us about it.

Q At these meetings in January?

A It was probably the second meeting we asked if they had the authority.

Q And their response was they did not?

A They did not.

Q Did you have occasion thereafter to meet with the board of education directly on negotiations?

A Yes. It was the early part of February the Teacher's Asso- [184] ciation did meet with the board of education, and I believe it was in the high school cafeteria.

Q And can you tell us the topic or the subject of that meeting?

A Once again, I think that Mr. Ralph expressed it, you know, our concern is to the board meetings, why the meeting was important, that we felt that we could not reach the board, and this is why they opened themselves up to us I believe, that we could talk directly to them if we had to, you know. We wanted to work together, but for some reason we just couldn't.

Q You attended that meeting?

A Yes.

Q Did you perform any role at that meeting?

A As president, I guess I sort of moderated the meeting in that the board members sat at a table, the way it ended up, and teachers in the audience would ask questions and I would repeat them; and if they directed them to any particular board member, that board member would answer. In most cases they were directed at Mr. Morris I believe or Mr. Morris answered them.

Q Mr. Morris being the president of the board of education?

A Of the board of education.

Q Were all the board members present that night?

[185] A Yes.

Q Mr. Ralph was present that night?

A Yes — Walt. Now that I remember, I don't think that he was present. He may have been, but I don't recall. Now when you mention it, I don't think he was.

Q The members of the board were present?

A Yes.

Q And teachers and you as the president of the association?

A Yes.

Q Did you speak at that meeting?

A Yes. I started the meeting with why I felt we were there; and, of course, there was a big question among the teachers —not necessarily among the teachers I don't think, but among the board members whether — or it was brought to my attention whether I represented the Teacher's Association and their views in that the actions that I was taking they supported.

Q If I may interrupt you for a moment. You say someone told you that, that you don't represent the Teacher's Association?

A I wanted to make sure that they knew I did represent the Teacher's Association because of the various — I don't know — things, you know, comments and things; it was obvious that maybe I didn't.

[186] Q Comments by whom?

A Well, O. K. You can go back to, for example, the polls that we had to take. As many times as I told Mr. Ralph that I did represent the teachers and that we had done our homework, I had to go back and get this poll to present to the board of education; and I think the poll showed that we had 94 percent of those people voting approved at that meeting. Very few people did not stand up when they were asked to stand up if they supported my actions as president.

Q Again, maybe you can describe this a little more in detail for us. You are referring to teachers standing. Did this occur at the meeting with the board of education?

A Yes, it did.

Q And what occurred that brought that about? Did you say anything that prompted the teachers to stand?

A Yes. I said that I felt that the board needed to know that I did represent the teachers as president of the Teacher's Association, and would those people who supported my actions please stand.

Q And a number of teachers stood?

A Very few did not. We also asked the people who did not stand, you know, after that.

Q If you can recall, Mr. Doyle, what comments, if any, did Mr. Morris as president of the board of education make to the teachers assembled there?

A Hard question. It dealt with whether — Well, there were many questions asked, and I think the big thing was concerning our trying to get agendas for board meetings, our trying to get financial data, the teacher concerns on being able to communicate effectively with the board, trying to work together for the same purpose, this type of thing.

Q How long did that meeting last, Mr. Doyle? Do you recall?

A Probably a couple of hours. I don't know.

Q Was this during the school day?

A This was in the evening.

Q And this was a scheduled meeting, I take it, between the board and the teachers?

A Yes, Teacher's Association.

Q Teacher's Association. Now, tell me did anything result from that meeting? Did the board's position change at all regarding the items that were negotiable or not negotiable?

A Well, something else. Yes, the board stated that they were empowered by the State of Ohio to — some things were just under their control and that the decision was theirs, that they had the authority to make certain regulations governing the school system and it was their [188] right and only right to do this.

And while we never disagreed that they had the final authority in regards to this matter, it was our belief that anything that involved teachers, working conditions or anything affecting the school system regarding teachers, should be at least discussed with teachers before a final decision was made to get our views, and that this was not being done.

And at that meeting it was emphasized many times that it was board policy and this was their right and only their right to do that.

Q Emphasized by whom?

A Their president, Pete Morris.

Q You say all the board members were present?

A Yes.

Q Mr. Morris speaking for the board of education?

A Well, most questions were naturally directed towards the president, I think.

Q Did any board members disagree with what Mr. Morris had to say?

A Did any board members disagree with him?

Q Yes.

A No.

Q As a result of that meeting did the board's position change [189] relative to those items that had previously been considered non-negotiable, non-discussable?

A No, it did not.

Q And it's your recollection this meeting occurred, did you testify, in early February 1970?

A It seemed like it was in early February.

Q Mr. Doyle, did you attend a meeting — I believe you testified that you attended board meetings as a matter of course as president of the association?

A Yes, I did.

Q Do you recall attending a meeting in January of 1970 with the board of education?

A There was one that I recall. It dealt with — Yes, they were approving at their board meeting something

with regards to the tax levy for the May — May elections.

Q Did you speak at that board meeting?

A Yes, I did. I felt that the board was making a mistake in regards to the tax levy.

Q In what regard? What did you say?

A O. K. Probably at least two things. One was that they had submitted an amount to go before the voters that the teachers once again did not have anything to say about. In other words, we felt that as a result of, if the levy did pass, there would be certain funds available and we hadn't even talked about those, how much money was needed; and also that I felt there was a very serious error in regards to separating the tax [190] levies, the renewal and the addition.

I felt that to run a quality program, if you are going to the public and asking for additional monies, it must be pretty important or you wouldn't be asking for them; therefore, why not include it all as one, on one ballot.

Q You expressed that to the members of the board of education —

A Yes.

Q — at their January meeting?

A Yes.

Q All members were present at that time, were they?

A I would — Yes.

Q Did you ever direct a written communication to the board of education on that subject?

A Yes, I did, because once again I felt like verbal actions and my duties as representative of the Teacher's Association were not being heard and a lot of times when things were in writing it makes a difference. So I did submit a letter to the board stating the views of Mt. Healthy Teacher's Association with regards to that matter.

Q I am handing you, Mr. Doyle, what has been marked

for purposes of identification as Plaintiff's Exhibit 21. Can you identify that document?

A Well, this particular letter is addressed to Mrs. Marcia Haupt. [191] Each board member did receive a similar copy. The only difference was that the name and the address would be different.

Q You sent a letter such as that, Plaintiff's Exhibit 21, to each and every board member?

A Yes, I did, through registered mail, I believe.

Q Registered letter?

A Yes.

Q Basically, what views did you set forth in that communication, Mr. Doyle?

A Well, the views, and this was — we got into it later on. We were packing paper tigers I reckon — was misunderstood by board members and the superintendent; that once again I felt that, as I expressed in the board meeting, the teachers were not being heard by the board through regular administrative channels because I am sure it's the administration's job to develop the millage. And we had not even — Teacher's Association never had the opportunity to talk about it. So that's why the first statement said that.

MR. O'CONNELL: If the Court please, I object and I move to strike that part of the answer about what the board —

THE COURT: Yes. This record can show generally, of course, [192] how the parties felt is neither here nor there. The only thing we are interested in is what expressions passed back and forth, but their basic feelings of why they felt that way are of no concern to this Court. We are not called on to pass on whether they were good, bad or indifferent.

Now, we are getting into that a lot and we are wasting

time doing it. We recognize that you can't forget it sometimes. But just so it's clear, any time a witness says he felt or he thought, it's just wasting everybody's time.

Now, what expressions went back and forth between them, O. K., but why it was discussed is of no concern to this Court. The expression itself is all right.

Q Mr. Doyle, what did you express through that letter to each and every board member?

A Bascially, that once again we were not being a teacher's association, was not being heard, and that we felt that they were making a mess by making two separate letters —

MR. BURKHOLDER: Your Honor, I object and ask that these —

THE COURT: Well, the letter speaks for itself. We are not getting in any trouble now. It's undoubtedly a correct transposition [193] of the letter. Go ahead.

Q Mr. Doyle, did you ever receive a response from the board of education to your letter to them of January 29th, 1970?

A Yes. While this letter went to board members and superintendent, all teachers in the school system received a reply to this letter. I guess it was early February. It must have been like around February 2d, something like that, 3d.

Q Mr. Doyle, I am going to hand you what has been marked for identification purposes as Plaintiff's Exhibit number 6 and ask you if you can identify that document, sir.

A Yes. This is the letter that I received along with all the other teaching staff.

Q And when is that letter dated?

A February the 2d, 1970.

Q And by whom is it purported to be signed?

A It's signed by each board member.

Q And does the letter refer and respond to your letter of January 29?

A Yes.

Q Mr. Doyle, going back for a moment — or ahead, back in your testimony, ahead in time — to the meeting which you and the asso- [194] ciation had with the board in February, early February of 1970, were there any teachers' meetings which occurred in February of 1970 regarding the board's position taken at the earlier meeting with the association?

A Yes. It was on the same day that we submitted our detailed proposal to the board of education and, of course, that was February 18th. We had an evening meeting with Jim Prater, our O. E. A. representative.

Q You said the same day your proposals were submitted?

A Yes, to the board of education.

Q There were proposals submitted by the association?

A It was the same nine proposals but they were more detailed in nature than the previous three negotiation sessions with the administrative team.

Q And how were these communicated to the board?

A O. K. There was a package. It had a cover letter, and I believe that was the thing I hand delivered to each board member, to their home, with several copies to Mr. Ralph in the board office.

Q Handing you what has been marked for purposes of identification as Plaintiff's Exhibit 8, can you identify that for us?

A Yes. That's a copy of the formal proposal.

Q Does it also include a letter?

[195] A Yes.

Q A transmittal letter?

A Yes.

Q Addressed to whom?
A Mr. Rex Ralph, superintendent.
Q You sent that to Mr. Ralph?
A I delivered it to his office, yes.
Q You delivered that personally to his office?
A Yes.
Q And I believe you also testified that you delivered that personally to each and every board member?
A Yes. I don't believe Mr. Ralph was in his office when I delivered it. I believe he was out of town.
Q Now, I believe you also stated that when that was submitted, at least it was your — it was the association's belief or your belief, based on the meeting that you had with the board, that the board was still considering certain items non-negotiable?
A Oh, yes.
Q Was that ever stated in writing to you? Did you ever receive a written memorandum?
A Well, yes. There was a sheet came out early in February listing the items that were negotiable and non-negotiable, but it was a very general nature. Of course — Yes, there was a sheet of paper.
[196] Q Handing you what has been marked for identification purposes as Plaintiff's Exhibit number 7, can you identify that for us, please?
A O. K. There was an earlier one that was a counter-proposal.
Q Can you identify that document?
A Yes. This is the one that we received. It has the date February 3d, 1970.
Q February 3d, 1970. I believe it reflects or lists certain items as negotiable and non-negotiable?
A Yes.
Q You were telling us before about a meeting of the

Teacher's Association which occurred on the same day as the day that you submitted proposals to the board?
A Uh-huh.
Q Could you tell us what the subject of that meeting was?
A Well, once again, it involved Teacher's Association concern that we could not sit down and discuss certain items with the board of education; we could not even talk about them in a negotiation session. It was that, yes.
Q Were there any resolutions passed?
A There was a resolution that was unanimously approved by all members present.
Q Do you recall the nature of the resolution?
[197] A That we should try to meet with the board of education, administrative team, at the earliest possible date to — I don't know. I would have to see it again, it's been so long. It dealt with these items were non-negotiable, I am sure.
Q Did you recall or do you recall if you sent a written letter to Mr. Ralph or anyone else regarding the meeting?
A Yes, I did. The resolution directed me to do that, yes.
Q Handing you what has been marked for identification purposes as Plaintiff's Exhibit 9, can you identify that for us, Mr. Doyle?
A Yes. This is the resolution, copy of it.
Q Is a copy of what?
A Of the resolution that the teachers agreed to that evening.
Q Is it a copy of a letter also?
A Yes. The resolution is included in the letter.
Q And to whom is that letter directed?
A Mr. Rex Ralph, superintendent.
Q And its date?

A February 19th, 1970; copies to all board members and all teachers.

Q Reading over that letter, does that refresh your recollection [198] as to the resolution that was passed?

A Yes, it does, yes.

Q Does that represent the resolution as you recall it?

A That is the exact resolution.

Q And you say you were instructed to communicate that to Mr. Ralph?

A Yes.

Q And you did do that?

A (Nodding.)

Q By the way, what was the resolution, Mr. Doyle?

A Do you want me to read it?

Q Just for understanding.

THE COURT: Just a summary of what it was about.

THE WITNESS: O. K.

MR. SGAMBATI: It's a very short one, your Honor. It is just a few lines.

A O. K. That if negotiations of all items proposed by the Teacher's Association were not discussed by the board in good faith, the Teacher's Association would take some action on the morning of Thursday, February 26th, to cause the negotiations to begin.

Q Mr. Doyle, that letter is dated February 18th, 19 —

[199] A 19th. It was the day after that meeting of February.

Q February 19th, 1970?

A Yes.

Q As you recall, was there any difficulty or anything that occurred around that time of the year, 1970, regarding parent-teacher conferences?

A Yes. While Mr. Ralph was away on some kind of convention to Atlantic City, Mr. Barnes, chief spokesman

for the administrative team, submitted some kind of a parent-teacher conference study to the elementary teachers. I believe this was done on February 17th because it was brought to my attention at that general meeting on February 18th.

Q Did you direct a communication to Mr. Ralph on that issue?

A Yes, I did.

Q Handing you what has been marked for identification purposes, Mr. Doyle, as Plaintiff's Exhibit number 10, could you identify that for us, sir?

A Yes. That is the letter I wrote to Mr. Ralph.

Q And the date on here?

A February 20th 1970.

Q Signed by you?

A Yes.

Q Copies to anyone else?

[200] A No. According to this, it was just to Mr. Ralph.

Q What's the general subject, just very briefly, of the letter?

A Parent-teacher studies, a study that Mr. Barnes had proposed. It was not agreed upon by the Teacher's Association and we didn't feel like this should be going on at that time.

Q Were you in negotiations on parent-teachers' conferences. In other words, was that a subject of negotiations at that time?

A That was at that time, but it was one of the items that was supposed to be non-negotiable.

Q And one of the items which you had wanted to negotiate?

A Yes. So we didn't understand why they were studying this thing.

Q Mr. Doyle, do you know if you recall any written response from Mr. Ralph to your communications to him of February 19th and February 20th?

A Yes. It seems like –

Q Did you receive such a written communication?

A Yes. It seems like Mr. Ralph was not aware of this situation and it seemed like it was sort of after polling that had even happened, and [201] he kept that from taking place.

MR. O'CONNELL: I object to the witness' characterization.

THE COURT: Sustained.

A (Continued.) Yes, this is the letter.

Q Just a moment, sir. I have handed you what has been marked for identification purposes as Plaintiff's Exhibit number 11. Can you identify that document for us, Mr. Doyle?

A This was the reply to my letter of February 20th.

Q That was a reply?

A Yes.

Q From whom?

A From Mr. Ralph. And once again, while my letter just went to Mr. Ralph, this went to all teaching staff also.

Q Will you read that over just very briefly, not into the record, just to yourself; tell us the general subject of that letter.

A Well, it dealt with three things that I had submitted to him; the package proposal, the letter regarding parent-teacher conferences, oh, and also the letter regarding the resolution that the teachers had passed at a meeting of February the 18th.

[202] Q Mr. Doyle, during the early part of 1970 did there ever come a time when the board of education or the

administration changed its position relative to what items were negotiable and non-negotiable?

A Yes, they did.

Q Would you tell me when that occurred?

A It was right around the third week of February.

Q Anything in particular which occurred at about the same time that had anything to do with their changing position?

A The Hinkle incident.

Q Could you describe briefly for us your recollection of the Hinkle incident?

THE COURT: Very well. We are going into a new subject, so let's recess until say a quarter of 2:00.

(Luncheon recess at 12:27 p.m.)

[203] AFTERNOON SESSION

1:45 p.m.

Frederick William Doyle, resumed.

THE CLERK: You are still under oath, Mr. Doyle.

DIRECT EXAMINATION CONTINUED

BY MR. SGAMBATI:

Q Mr. Doyle, I believe before we broke for lunch you were beginning to describe to the Court the Hinkle incident. I am sure you know what we refer to or what we are referring to when we say the Hinkle incident, and I would appreciate your describing that as you recall it.

A On a Friday morning in February Mr. Hinkle came into my classroom before classes started, before homeroom started, and closed the door and he asked if I could talk to him – or if he could talk to me, rather. Excuse me.

The first thing he mentioned was that he had not re-

ceived notice of the December 18 evening meeting of the Miami — or Mt. Healthy Teacher's Association.

Knowing that I had put a notice in all teachers' boxes in the teachers' lounge, I told him that he had had to have received it; maybe he misplaced it in his records.

Then he went into a discussion as to whether I really represented the Teacher's Association, represented all teachers. And I pointed [204] out to him the meeting that we had with the board of education earlier in February, that we started out that meeting with all the teachers who favored my actions as president of the Teacher's Association standing up; and I said, "I think you could see from that that apparently I must represent the teachers."

And from there it's sort of vague exactly what happened, but I know it was either then or shortly thereafter he slapped me in the face, and it was a very hard slap. At that time —

Q Did you strike him at any time?

A No, I did not. At that time —

Q Did you threaten him at any time?

A No.

Q Say anything other than what you are saying, what you testified you said?

A No.

Q What did you do after you were slapped by Mr. Hinkle?

A Well, of course, I didn't understand why he hit me and I wasn't about to stay in the room to find out anything more. He said he wanted me to stay; he wanted to talk about it. I didn't feel I could.

And so I walked across the hall to Mr. Stragand's office. He was not in his office at that time. He was in the corri- [205] dor with some stu- dents. So I walked down to Mr. Shell's office. Mr. Shell was in there.

He asked what had happened. I related that to him, at which time he left to get Mr. Hinkle and Mr. Stragand.

Q Did you get Mr. Stragand?

A Mr. Stragand came and asked me what had happened. I told him the same thing I just mentioned, and I think — I am not sure if he had talked with Mr. Hinkle prior to that or not. I don't think he had. At that time he went down to his office.

Q Meaning Mr. Stragand's office? You are talking about you and Mr. Stragand went to Mr. Stragand's office?

A Yes.

Q Was Mr. Hinkle with you?

A I don't think so.

Q Did he eventually come to Mr. Stragand's office?

A Yes. Mr. Stragand sent for him — or he went for him or sent for him, one of the two. But we talked for a while before Mr. Hinkle came up, I know that, about what happened.

I just couldn't understand why this had happened, you know; it didn't even make sense, why someone would hit me.

[206] Q This is what you told Mr. Stragand?

A Yes. I was telling Mr. Stragand this. There was just no reason in the world that I should be hit for what I had said, you know, in that I was representing the Teacher's Association to the best of my ability.

And I guess I had, you know — I knew I had put a notice in his box, if that's what it was about. I am not sure. But there was no reason in this world why I should have got slapped.

Q This is what you told Mr. Stragand?

A Yes.

Q Tell me, were you physically injured as a result of this?

A The left side of my face was very red and my eye was very bloodshot.

Q Did Mr. Hinkle ever come into the meeting with Mr. Stragand and you?

A Yes. He didn't have much to say. He did say that he was sorry.

Q Did you then meet with Mr. Ralph on the incident?

A Yes.

Q Was it that day?

A It was that same day.

Q Now, could you tell us about how long your meeting with Mr. [207] Stragand lasted?

A It was probably about an hour with just Mr. Stragand and myself, and probably another half hour or so with Mr. — No, it wasn't that long with Mr. Hinkle. And then there was about a half hour after that, probably. It was probably a total of two hours, two hours and 15 minutes, something like that.

Q Do you remember what time of the day it was?

A It was right at the beginning of school that day.

Q Did you have teaching responsibilities the first period of the day?

A At the first period I did not have. That was my conference.

Q You met with Mr. Ralph thereafter; is that right?

A Yes.

Q Did Mr. Hinkle meet with Mr. Ralph also?

A Yes. He was over there when I arrived.

Q What, if anything, did Mr. Ralph talk to you about or say to you that day during that meeting?

A Well, we went through the same process that we went through with Mr. Stragand explaining what had happened. Once again Mr. Hinkle did not deny anything I had said. He did once again say he was sorry.

[208] Q What did Mr. Ralph say, if anything?

A Mr. Ralph, why, he just wanted to talk to both of us, that this type of behavior was not to be condoned by any of the faculty members; but he also expressed to me that apparently there must have been something I had done more than what I was saying that caused Mr. Hinkle to slap me. In other words, there is two parties to every incident, you know; I had to have done more, which I disagreed with because there wasn't anything that I hadn't said, you know, to indicate reasons for that.

Q How long did that meeting last with Mr. Ralph?

A It seemed like a half hour or 45 minutes. I don't know, but that would be probably — It wasn't that long, I don't think.

Q What, if anything, did you do after that meeting?

A I returned to the high school and finished my classes for that day.

Q You did finish teaching that day?

A Yes, I did.

Q Did you meet with Mr. Ralph after the day of the incident regarding the incident?

A Yes. Mr. Ralph did — No. He said he would get back with me again on that, and so I reported back to school — Let's see. Excuse [209] me. We had a meeting that evening. Well, there was a board meeting that evening. Is that what you wanted to hear?

Q Well, no. I wanted to know if you met in the future with Mr. Ralph on the Hinkle incident, where the Hinkle incident was the subject of the meeting.

A Well, there was a board meeting that evening when it was brought up, plus I was called to his office the next morning.

Q You say you were called to his office?

A Yes.

Q Did you meet with him about the incident?

A O. K. I reported to the classes that morning and Mr. Peters came in and informed me that I had a substitute for that day. I didn't understand that. And he said that Mr. Ralph wanted to talk to me, and I didn't realize it was going to talke all day.

So I went over to Mr. Ralph's office, and Mr. Hinkle was there. Mr. Ralph asked me if I was ready at that time to accept Mr. Hinkle's apology. Well, through all the events that had occurred, I felt – well, O. K.

Q What did you say in response to Mr. Ralph's question?

A That at that time with things the way they were, I didn't feel like Mr. Hinkle really meant what he was saying and I could not accept his apology at that time.

[210] Q Is that what you told Mr. Ralph?

A Yes.

THE COURT: What day was this?

THE WITNESS: Tuesday, the day after the incident, the best I can recall.

Q It was the day after the incident?

A Yes. Excuse me. No. That incident happened – Excuse me. The incident happened on Friday and this was on Monday. Excuse me. That's right. This was on Monday.

MR. O'CONNELL: What, the board meeting then on Monday?

THE WITNESS: That evening, right.

Q Was the board meeting on a Monday night or Friday night?

A O. K. The board meeting was Monday night.

Q Monday night?

A I am sorry.

Q O. K. So Mr. Ralph asked that you accept Mr. Hinkle's apology?

A Yes.

Q And you told him you couldn't at that time?

A Right.

Q What did Mr. Ralph respond, if anything?

A O. K. This is the first time I saw Mr. Ralph physically upset. He had some papers on his desk in a folder, and he folded those up [211] and hit them on the desk.

He says, "Well, if you can't do that I will have to take action." You could tell he was nervous, and he said that I would be suspended for the day along with Mr. Hinkle – or I would be suspended until we could take care of the situation.

I was not to report back to the high school, I guess to go home – yes, but I was not to report to the high school for any teaching assignments. We further clarified what extracurricular activities I would do.

And, of course, at that point I didn't understand his actions because, once again, I didn't feel – I felt like I was being pushed into something that I wasn't ready for.

Q Well, did you respond to his telling you that you were suspended until the matter could be resolved?

A Yes. That's when I tried to reason with him why he was doing this.

Q What did you say, if you can recall?

A That I didn't know why I was being found guilty of something that I had no wrongdoing to begin with.

Q Returning a moment to Friday, the day of the incident, did you ever tell any students about the incident?

A No.

[212] Q Did you tell anyone else about the incident other than –

A O. K. When I was in Mr. Shell's office, and I don't

recall what teacher it was, but it seemed like it was Bruce Henn — I don't recall; I know it was a teacher — happened to be walking by and saw me in there and asked what happened, and I told him Mr. Hinkle had hit me and, you know —

Q Well, at that time you say your face was red —

A Right.

Q — your eye was bloodshot?

A Right. In regards to the students, when I returned to my classes, I know students were aware of this information at that time. I did not talk to them about it.

Q You did not talk in your class about the incident?

A About this incident; I didn't feel like that was right.

Q Tell me, going back to Monday, the day you met with Mr. Ralph and the day you were suspended, what did you do after that?

A The day I was suspended?

Q After the meeting with Mr. Ralph.

A I went home.

Q And this is Monday now?

[213] A Yes. The first thing I did, I went home. Do you want me to continue?

Q Did you do anything else?

A O. K. I tried to think out, you know, what had happened. I felt like —

Q What, if anything, did you do?

A O. K. The situation was not right, you know. There was something wrong here and I needed — I needed someone to talk to. At that time I went — I either called Mr. Lippmeier's home —

Q Who is Mr. Lippmeier?

A He was — I believe he was the vice-president of the board of education at that time. He was at least a member. I felt like a board member should know what had happened

here. And so Mrs. Lippmeier called Mr. Lippmeier, who immediately came home. I explained the situation to him.

Q Now, when you say came home, did you meet with Mr. Lippmeier at his home?

A At his home.

Q You went to his home?

A I went to his home.

Q O. K.

A He at that time —

Q What did you tell Mr. Lippmeier?

A I told him all the events that had happened to that point with [214] Mr. Ralph suspending me.

Q What, if anything, did he say to you?

A He said that he felt that I had been wronged.

Q That you had been wronged?

A Wronged; not that I was wrong, that I had been wronged.

Q O. K. What, if anything, did you do thereafter?

A We discussed the situation. He left — called Mr. Ralph's office. Mr. Ralph was not in. They told him Mr. Ralph was over at the high school, and Mr. Lippmeier left to go there. I told him I was going to call O. E. A. office, Jim Prater, to —

Q Again, O. E. A. being the Ohio Education Association?

A Ohio Education Association. Before I called O. E. A. knowing this whole thing was wrong, I was not permitted to go back to high school. It was a situation that the Teacher's Association should have been informed about. I called Bruce Henn at the high school.

Q What did you tell Mr. Henn?

A That I had been suspended; Mr. Ralph had suspended me, and that I was not to report back to the high school. It was not a very long conversation.

Q Did you tell him that there ought to be a teachers' meeting at [215] any time?

A No. He told me that I should call O. E. A. in a situation like this.

Q You indicated that you did place a phone call to the O. E. A. office?

A Yes.

Q Now, tell me, was there a meeting which occurred that evening which also concerned the Hinkle incident and the suspension?

A Yes; and it's been so long ago, it's the best of my recollection. It seemed like it was a board meeting, which later had to be moved to the snack bar at the high school because there was an overflow crowd of teachers.

Q Did you attend that meeting?

A Yes, I attended that meeting.

Q Was the Hinkle incident discussed?

A They had the regular meeting, and this was brought up under special orders. It seems like they caucused and we caucused also.

Q When you say we, who do you mean?

A The executive committee of the Teacher's Association.

Q Was that problem resolved that night?

A O. K. Not entirely to the satisfaction of the teachers' group [216] in that the board agreed to give me a hearing approximately a week later or something like that. So, and this was not right in that — I didn't feel like I had made any wrongdoing to begin with.

Q Well, they agreed to give you a hearing?

A Yes.

Q Was anything said about your suspension?

A That I was permitted to assume my classes the next day.

Q Classroom duties?

A Yes.

Q And you say this wasn't acceptable —

A No.

Q —to the Teacher's Association?

A Right.

MR. O'CONNELL: I am sorry. I don't mean to interrupt, but I don't think I heard what you said. Were you to resume your classes the next day or not?

THE WITNESS: Yes, I was.

Q Now, were there other meetings on this Hinkle incident and, particularly, the following day?

A Yes. It seemed to me like it was the next night, Tuesday night, we had arranged a special meeting.

Q Again when you say —

A The Teacher's Association, O. E. A. and the board of education.

[217] Q. O. K. Did a meeting occur?

A A meeting occurred.

Q Who was in attendance?

A O. K. The board —

Q The board, meaning all members of the board of education?

A Mr. Ralph, Mr. Bob Baker —

Q Mr. Baker being the attorney for the board of education?

A Attorney for the board of education. — Bill Stoltz from O.E.A. There was another fellow from O. E. A., and the executive members and the negotiating committee of the Teacher's Association.

Q And you were in attendance at that meeting?

A And I believe Mr. Hinkle was there. I am not sure.

Q Yes.

A I was there.

Q O. K. Was the problem resolved that evening?

A Through many hours of discussing, yes.

Q How long did that meeting last? Do you recall? Can you approximate as a matter of an hour or four hours or six hours?

A More like four hours, I guess.

Q Did it extend late into the night?

[218] A Yes.

Q Were there any conversations during the meeting between the board of education and Mr. Ralph while you were present?

A Not while I was present, but they were discussing while I was out there. They were meeting. I am sure they were discussing with Mr. Ralph.

Q Well, was there any letter or any indication in writing given to you as the result of their discussions?

A At a Teacher's Association — It seemed like Jim Bayliss, he was the president elect — I believe it was him that was acting as spokesman. I am not sure. The Teacher's Association wanted an apology, Mr. Ralph to write an apology, which I don't think — Well, he didn't want to do that, but they did write another thing that he signed saying that I was not guilty of conduct unbecoming a teacher in the Mt. Healthy system, words to that effect.

MR. O'CONNELL: If the Court please. I object. There is a document which speaks for itself.

THE COURT: All right. Then the objection is sustained.

THE WITNESS: O. K.

Q Handing you what has been previously marked for identification purposes as Defendant's Exhibit number 4, can you identify that document [219] for us, Mr. Doyle? Have you ever seen a copy of that document?

A Yes. This is the one that they drew up that evening, the board.

Q Will you read that, please?

A "Upon further investigation and consultation with the parties involved, I have recommended to the Board of Education that Mr. Doyle's request to withdraw his request for hearing upon his release of duty, be granted and that all charges of conduct unbecoming a teacher against him be dismissed."

Q Was that signed by anyone?

A Signed by Rex Ralph, superintendent?

Q What, if anything, was to be done with this document? Do you know?

A Well, as far as I can recall anything regarding this incident, whether it would be in board meetings or official records, was to be deleted; and I am not sure whether that was to be in my record or not. I am not sure. This was to satisfy primarily the Teacher's Association.

Q Was there a meeting of teachers, the Teacher's Association, which followed the meeting with the board of education; in particular, the next morning? Do you recall any?

A When? There were so many meetings I am not sure which one you are talking about.

[220] Q Do you know if the Teacher's Association expressed in any form their satisfaction with this writing or the resolution of the problem?

A O. K. There may have been a meeting that Wednesday morning, a general meeting of the Teacher's Association. Am I correct?

Q But if there was, you have no specific recollection of it; is that right?

A I know there was a meeting sometime, but I don't know if that was it or not.

Q Did you attend that meeting —

A Yes.

Q — whenever it occurred?

A Yes, whenever it occurred.

Q Is it your recollection that the meeting occurred shortly after the final meeting of the board of education.?

A Yes.

Q Do you recall what the subject of conversation was — or the subject of the meeting of the association was?

A O. K. It was to bring them up to date with the events as they had occurred.

Q And this was an association meeting?

A Yes. There was something else discussed at that board meeting that I felt was important.

[221] Q Well, O. K.

A Mr. Baker —

Q Did you participate in those discussions?

A Yes.

Q What else was discussed at that board meeting? Again we are referring to the meeting in which —

A That was drawn up —

Q — the letter from Mr. Ralph was drawn up.

A (Nodding.) The board had informed the Teacher's Association that Mr. Bob Baker and Mr. Ralph would be acting as the administration team, and the board was doing this to express their good faith to the Teacher's Association.

Q Prior to that time there were other individuals who were going to act as their negotiators; is that correct?

A Yes.

Q Was there any change in position relative to items which would be negotiated?

A All items were negotiable.

Q All items were negotiable?

A Yes.

Q And also you testified that the negotiators would change?

A Yes.

Q Did negotiations commence thereafter?

[222] A Yes, they did. It seems like it was a couple of weeks, and then they were pretty regular there often — thereafter.

Q Was an agreement eventually reached?

A Yes.

Q Can you give us an idea of approximately when that occurred?

A The end of April or the beginning of May.

Q Of 1970?

A Yes.

Q And this incident, the Hinkle incident, occurred in February?

A February.

Q 1970?

A '70.

Q Did you participate or continue to participate in negotiations then —

A Yes.

Q — after the Hinkle incident?

A Yes, I did.

Q Did you remain as chief spokesman of the association?

A Yes, I did.

Q Could you approximate how many negotiating sessions were conducted?

[223] A There were 10.

Q Ten negotiating sessions?

A Yes.

Q That's between the end of February and the end of April or beginning of May?

A. Right.

Q Was an agreement eventually reached?

A Yes, it was.

Q Did you attend all of the negotiation sessions?

A Yes.

Q And did Mr. Ralph attend all those sessions?

A Yes.

Q Mr. Doyle, did you continue to serve as president of the Teachers' Association during the balance of the school year?

A Yes, I did.

Q Did you hold any position with the Teacher's Association during the following school year, that is the 1970-71 school year?

A According to the new constitution, the immediate past president was to be a member of the executive committee in an advisory capacity.

Q And did you serve as —

A I did.

Q — a member of the executive committee?

[224] A (Nodding.)

Q And also as an advisor to the association?

A Yes.

Q During the 1970 or '71 school year did you have occasion to file a grievance?

A Yes, in regards to hospitalization for my wife and myself.

Q What was the nature of the grievance?

A Whether the board would pay two single policies, one for my wife and one for myself.

Q Both being teachers in the school system?

A Yes, both employees, yes.

Q What was your position?

A Well, having negotiated the agreement, I knew that we had talked specifically about that item right there; and Md. Ralph, I recall very well, in the last session said that no, we couldn't apply two single policies towards a group plan — or not a group plan, but a family plan; but that two teachers that were married could apply for two single plans. And that was the matter of the grievance.

MR. O'CONNELL: If the Court please, I am objecting. I don't think this is the place to relitigate that matter.

THE COURT: That's right.

MR. O'CONNELL: It happened, and there was an arbitration [225] and it came to a conclusion.

THE COURT: That's it.

MR. SGAMBATI: I think the purpose, your Honor, was by way of explanation.

THE COURT: What does that explain? The only point is that presumptively they arrived at some contract which contained a grievance clause. I am guessing at that. Presumptively, this plaintiff as an individual filed a grievance and the thing calls for automatic arbitration to an arbitrator, period. We don't even care what the result was, much.

MR. SGMBATI: No. I don't think, your Honor, if I might just make reference; I was just trying to establish that in fact a grievance was instituted and there was certainly a bone of contention or a difference of opinion between Mr. Doyle —

THE COURT: The witness has evidenced it on the witness stand and a personal feeling for one of the defendants. This Court is not missing that. I don't know how that helps him. Without going back into that, maybe we

will get the other side of the coin later on, but you have got all his testimony.

Introduce the grievance. We will let you introduce the grievance, the contract and the decision, and save all this time. [226] Nothing more to be said.

MR. SGAMBATI: The difficulty is we can't locate the actual grievance. I think we have a copy of the decision of Judge Castle.

THE COURT: All right.

Q Mr. Doyle, the testimony reflects you did file a grievance and that that had to go to arbitration.

What other activity did you participate in during the 1970-71 school year, if any? I mean of the Teacher's Association?

A I was chairman of a contingency committee and also of a unification committee of the Teacher's Association.

Q Mr. Doyle, the subject of this action is obviously your non-renewal, and I think the evidence already reflects that you were notified the first part of April of 1971 that you were in fact non-renewed by the board of education. What I am asking you is: Did you do anything in response to receiving that notice?

A I had to conference with Mr. Stragand and also one with Mr. — probably a couple with Mr. Ralph.

Q Why did you have a conference with Mr. Stragand?

MR. BURKHOLDER: Your Honor, I object if we are talking about things that happened after the event.

THE COURT: Yes. We can conceive of some relevancy on [227] what was said, but why?

MR. SGAMBATI: I think the evidence would demonstrate it, and I don't want to suggest testimony to the witness, but there is obviously an expectancy question and surprise.

THE COURT: I know. If you want to talk about

some prior facts, go ahead, if you want to ask him some questions about some prior facts. Buy why he says something, what relevance is that?

MR. SGAMBATI: Just to demonstrate — well —

THE COURT: On the why, it will be sustained. What goes through a witness' mind or causes him to do something has no relevance.

Q Mr. Doyle, did you request a statement of the reasons for your non-renewal?

A Yes, I did.

MR. BURKHOLDER: Objection, your Honor.

THE COURT: Well now, you have introduced some evidence on this I think yourself.

MR. BURKHOLDER: We have not yet.

THE COURT: Well, all right. Go ahead on this. It's already in this record one way or another.

MR. SGAMBATI: Isn't it a joint exhibit?

THE COURT: Yes. It was a stipulation. The first thing that [228] happened in this case, it was stipulated that there was a request made and a given answer received. Go ahead.

MR. SGAMBATI: Do you have the joint exhibits?

THE COURT: He asked for a statement of the reasons. (Handing.) Is that what you are looking for?

MR. SGAMBATI: Right, this is it.

Q Mr. Doyle, you received a statement of the reasons, did you not, from Mr. Ralph?

A Yes, I did.

Q Handing you Joint Exhibit 7, directing your attention to the first item, the first reason given which refers to an incident which occurred in the cafeteria of the high school. Now, could you tell us or briefly describe to us what occurred on the day of the incident mentioned there in Joint Exhibit 7?

A There were several students I had reprimanded on many occasions who were not doing what was expected of them or anyone else in the same situation. They weren't taking their trash back or they were leaving it around, stuff like that. They were disrespectful towards me. They did eventually put their paper away, after making a big scene.

As I left the room, the snack bar that day, I walked down the hall to go to the teachers' lounge. The four girls were out there in the [229] hall, once again showing disrespect towards me. And this was a situation that had taken place over a couple of months, and it had built up to a point I was — I just didn't know what to do. I was proud that I could always handle my own discipline problems, and, being in the middle, if you couldn't handle it, you know that would be bad also.

At this point I couldn't handle anymore, and I showed my frustrations by giving what has been called an obscene gesture.

Q Is that the same gesture that Mr. Stragand —

A Yes.

Q —indicated to us, the index and small fingers —

A Yes.

Q —extended; is that correct?

A Yes.

Q Well, did the students do or say something which prompted you to do that immediately before you did it?

A Yes. They were continuing with their disrespectful attitude towards me.

Q When you say "disrespectful" —

A O. K.

Q —would you describe that a little more in detail?

A O. K. It's a situation that's really hard to explain specific [230] words and things like that, but comments

that weren't — I couldn't hear that well, and the way they acted in the hall tended to indicate, you know, this disrespect.

Q For you?

A Towards me, yes.

Q Did they mention your name?

A Yes.

Q Used obscenities?

A It's kind of hard to say. It was just — I realize it's a bad — I just couldn't hardly explain that situation, you know, things happened so fast.

Q. Now, at that point in time how long had you been serving in the lunchroom?

A This is my second year as lunchroom supervisor.

Q Did you have any difficulties before that with students?

A Oh, you always have students — you always have problems, especially at the beginning of the year — and that's what this was — who don't take their trash back or things of this type, and —

Q Did you take these students to the office?

A After they had given me another — a different type gesture.

Q Mr. Doyle, when you say that gesture, what in your mind did that mean, to you, that gesture?

[231] A The same as Mr. Stragand referred to, "Screw you."

Q Oh, her gesture to you?

A Her gesture to me.

Q I am referring to your gesture to the students there.

A Bull.

Q Do you know what grades these students were in?

A No; ninth through twelfth (shaking head).

Q And then what did you do?

A I took the four students to Mr. Peters' office and explained the situation to him. I felt like I would like for him to know that I did need his help at this point.

I explained to the girls that, you know, I like to handle my own problems and I was sorry that it had to get to this point. I was sorry I had to bring them down to the office. And, of course, one of the girls was still disrespectful towards me, as was reported earlier.

Q Well, how long did the meeting in Mr. Peters' office last with these students?

A Probably about 15 minutes.

Q Fifteen minutes. And what did you do thereafter?

[232] A I went to my classes.

Q You went to your classes?

A Uh-huh.

Q Were you at all criticized that day or any other day because of that incident?

A No.

Q Are you saying that you weren't criticized by any member of the administration for that incident?

A No.

Q I take it you weren't removed. Did you continue as the —

A Yes.

Q —supervisor in the cafeteria?

A Yes.

Q The entire year?

A Yes.

A The second incident listed on the letter of April 15th, 1971 refers to an incident with the WSAI radio station. Would you please describe for us what occurred on that day?

A I[n] our mailbox, as Mr. Stragand had placed something that was submitted earlier today, dress code for the

high school. We had previously had meetings about the same thing. Once again, it involved teachers not having say-so in regards to anything that affected their teaching.

[233] This came from administration. We had nothing to say about it, and we had several meetings in regards to that same thing.

MR. O'CONNELL: If the Court please, I object to the conclusion.

THE COURT: All right, same ruling, sustained.

Q What did you do, if anything, when you saw a copy of the dress policy?

A Why, after reading it, I called a friend I had at WSAI radio station and I read it to him.

Q You read it to him?

A Yes.

Q What else did you say to him, if anything?

A Why, I knew — having worked with him before, I knew he was interested in things of this nature.

Q Where had you worked with him before?

A With F.B.L.A. after school dances, basketball assembly and with the WSAI heart fund, to raise money for the heart fund.

Q Did you criticize the policy?

A I don't think I criticized it. I just read it and I, of course, I am sure — Well, I don't remember I criticized. I wasn't pleased with this being unilaterally imposed on us.

Q Did you at any time request that this friend of yours broad- [234] cast anything about that?

A No. He wasn't a news reporter or anything like that. He was just a disc jockey.

Q Mr. Doyle, after you were non-renewed, were you able to secure employment?

A Yes, I was.

Q When were you not reemployed, or when did you receive notice?

A April.

Q April of 1971?

A Yes.

Q And when did you obtain other employment?

A It seems like it was in June I think I finally signed a contract with the Miami Trace school system in Washington Court House.

Q Your present employer?

A Yes.

Q If you can, Mr. Doyle, what position did you work at during that time?

A Guidance counselor all three years.

Q Could you tell us what your earnings were for your regular guidance — well, your regular contract with the Miami Trace board of education for the years since your non-renewal?

A In probably round figures, 1972 was about $8400; next year, [235] 1972-73, was $9,773; and this last year was $10,395.

Q Mr. Doyle, did you have to relocate as a result of — No; strike that.

Immediately after your non-renewal or being advised of it, did you seek employment in the Cincinnati area?

A Yes. While I originally planned to be in Mt. Healthy since I had lived in Cincinnati all my life, so I applied to all the school districts in the area, with no response.

Q You mean you applied, filled out formal applications?

A Yes, I filled out formal applications.

Q Can you approximate how may school districts you filled out applications for?

A About 30.

Q About 30?

A That probably included some outside the area too, pretty close to the area.

Q Did you receive any response from those in the Cincinnati area?

A No.

Q I take it you did receive response from the Miami Trace schcool?

A Yes.

[236] Q Did you have to relocate as a result of your accepting a position at Miami Trace school district?

A Yes. It was 86 miles away.

Q Eighty-six miles from your home in Mt. Healthy?

A Yes.

Q Can you tell us if you incurred any expenses as a result of relocating?

A It was part of my income tax that year or a year later which I filed. It was about $480, the best I recall. I would have to look it up.

Q $480 —

A Yes.

Q — were the expenses you incurred in moving?

A Yes.

Q To where did you move?

A Washington Court House.

Q Washington Court House, Ohio?

A Uh-huh. I have since moved to Jeffersonville.

THE COURT: Whereabouts in Jeffersonville?

THE WITNESS: It's 12 miles west of Washington Court House.

THE COURT: Towards Springfield?

THE WITNESS: Yes, towards Springfield.

THE COURT: Thanks.

Q Mr. Doyle, I am going to hand you what has been

marked [237] for identification purposes as Plaintiff's Exhibit number 17 and ask you if you can identify the document.

A It appears to be my evaluation for 69-70 school year.

Q Prior to your non-renewal, were you ever presented with a copy of that?

A I wasn't presented with a copy. It was —

Q Was your performance ever discussed?

A Yes. We had regular conferences with the principal who would go over your evaluation.

Q Did you have a conference with Mr. Stragand on your teacher performance during the 69-70 school year?

A Yes. Each year I think we had two.

Q What did you tell Mr. Stragand, or what prompted the meeting with Mr. Stragand on your evaluation?

A Well, it was the practice to go over, you know, the evaluation sheet, at which time they would mention any characteristics needing improving. They would mention your excellent characteristics, and he also explained the new evaluation form that they had started that year.

Q Did he also explain your performance?

A Yes, he did.

Q What did he say about your performance?

[238] A He said that as far as he could tell it was very good.

Q Did he show you a copy of the evaluation?

A It was laying on his desk. He didn't actually hand it to me, no.

Q Did he tell you approximately where you fell on the various grade markings that appear on the form?

A Yes. As he explained it under the new system, because I sort of disagreed with him about my rating, he explained that this middle section was where most teachers

fell and that I ranked as high average and that's why most of my check marks were around 7 and 8.

And it was my assumption that that's where most teachers would be, because I disagreed with him in that I received merit pay the previous year, that why my rating was, for example, 7 and 8 in some instances, and that satisfied him.

Q And you were advised —

A Yes.

Q — that that was —

A High. It was high average.

Q And that form reflects high average, does it not?

A Yes, it does.

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[312] REDIRECT EXAMINATION

BY MR. SGAMBATI:

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[314] Q All right. Mr. Doyle, under questions from Mr. O'Connell, I believe you testified that this WSAI incident surrounded the dress code and that you had not discussed this matter immediately before the phone call with Mr. Stragand; is that correct?

A Not that day.

Q Had you discussed it with him on previous occasions?

A We had discussed it with all the principals, yes.

Q All right. In fact, there was a matter of concern amongst the teachers at that time?

A And it was agreed at that meeting that we would not have a formal dress code like that.

Q Agreed at which meeting?

A With the principals and the executive committee of the Teacher's Association.

Q Do you recall when that meeting occurred?
A No, I don't. I know it was that school year.
Q It was before the memorandum —
A As far as I can recall.
Q — by Mr. Stragand?
[315] A As far as I can recall.
Q So that you had in fact tried to work things out prior to that time?
A Oh, yes.
Q Now, with respect to other teachers who were non-renewed in the spring of 1971, are there teachers who you were aware were active and who were not renewed?
A Yes.
Q Who were those teachers?
A You mean Mrs. Holmes? Mr. Brown and Mrs. Fast.
Q What position did Mr. Brown hold?
A He was president elect.
Q Did he hold any other positions?
A He may have served on some committees.
Q And Mrs. Fast, what position did she have?
A She was a building representative.
Q And Mrs. Holmes?
A Was also a building representative.
Q And you were past president and member of the executive board?
A Right.

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[316] **Marcia Balfour Haupt,**

called as a witness by the plaintiff, being first duly sworn, testified as follows:

CROSS-EXAMINATION

BY MR. SGAMBATI:

• • •

[330] Q Now, directing your attention to the latter part of February of 1970, in particular meetings which occurred relative to the Hinkle incident — Do you recall that incident?
A Yes.
Q Do you recall whether the board was required to meet with the association on those instances?
A We met with them two or three times that week. Now, we had a regularly scheduled public board meeting that had been published in the newspapers on Monday evening, yes, the fourth Monday of the month when we normally meet at 7:30, so this was a regular meeting that was scheduled.

Tuesday, we met with the teachers from 4:30 in the afternoon [331] until 12:30. We did meet with them.
Q From 4:30 in the afternoon until 12:30?
A 12:30 at night (nodding).
Q When was that?
A Tuesday. I believe that would be February 24th.
Q The day following the board meeting?
A Right.
Q And what was the subject of that meeting?
A Whether the teachers were going to teach or not. They had been meeting every morning at 6:30. They were so concerned about this slapping incident and the administration's handling of it that they were meeting each

morning at 6:30 for two or three mornings to decide whether they were going to go to school and teach or not. They had not taught taught Monday. School had had to be closed Monday at 12:05.

Q Now, that concern of the teachers was respecting Mr. Doyle's suspension, was it not?

A I don't know what their concern was. They were discussing it in school when they should have been teaching students. They were not in their classrooms. There was little, if any, teaching done by a majority of teachers at the high school.

The teachers were meeting in, I understand, the gymnasium [332] under their supervision, so they could meet obviously elsewhere. That was a teaching day. No such meeting had been scheduled.

Q Well, the meetings I am referring to are the meetings between the board and the association and their concerns, that is the association's concerns, expressed in those meetings. Their concern, their primary concern was the suspension of Mr. Doyle, was it not?

A I don't know. I was not there. I understand Mr. Lippmeier was there and Mr. Ralph was there.

Q Well, didn't you meet with the Teacher's Association from 4:30 to 12:30?

A Tuesday, the day after.

Q Well, wasn't that still of some concern, the suspension of Mr. Doyle?

A It was one of the subjects they were discussing; but, as I say, they were also in the area of what was to be negotiated and what wasn't to be negotiated. This was their concern.

Q And who expressed those concerns?

A Oh, many of them, but I would believe Mr. Doyle would be their primary spokesman. And this is the point

at which we called in Mr. Bob Baker and he appeared and attended those meetings.

[333] Q What was the board's position on Mr. Doyle's position, if any?

A We followed the recommendations of the superintendent. He had suspended those two teachers we felt for good and just cause and we supported that suspension; and when he recommended that they be reinstated, we supported Mr. Ralph.

Q Did Mr. Ralph explain to you what good and just cause existed for the suspension of Mr. Doyle?

A That he was so upset emotionally that he wasn't able to teach and he had been sent home, is our understanding.

Q That he had been sent home or that he had been suspended and prohibited from teaching school?

A Friday, the day of the incident, I understand he was so upset he was not able to teach the majority of the day.

Q Well, this isn't when the suspension occurred, did it?

A Monday I believe the suspension occurred.

Q Monday the suspension occurred?

A I believe the suspension occurred Monday.

Q And, as far as you know, that was Mr. Ralph's decision?

A Right, and this was explained to us.

Q What did Mr. Ralph explain to you as the reason for suspend- [334] ing — that he suspended Mr. Doyle? Was it because he had been emotional when he was slapped or was it because he didn't accept an apology, or what was the reason, if any? Did Mr. Ralph tell you why he suspended Mr. Doyle?

A Because they had not been able to resolve the situation and it was still undecided, and he had felt that the

only way to handle it at that point was to suspend these two teachers from the school who were the center of this controversy, get them out of the school building so that the rest of the teachers would get back to teaching, as they were supposed to be doing.

Q Now, it's your testimony that it's your recollection that the teachers didn't teach on Monday?

A Correct.

Q That was after the suspension; correct?

A The suspension, as I understand it, occurred on Monday.

Q Monday morning?

A Right.

Q And, as you understand it, the meeting occurred after the suspension, that is the teachers' meeting in the cafeteria?

A I don't know what the time would have been. I understand the teachers were meeting about 10:30. There was no teaching going on [335] that morning. School was closed at 12:05.

I met the students coming out of the school and asked them, you know, what was going on. I was out collecting for heart fund, a day late. I had another obligation on Sunday. And I was stunned to see all the students streaming home from high school who normally rode buses.

Q So you didn't participate in the decision to send students home on Monday?

A No. This was made by Mr. Ralph, I understand.

Q Now, again on Tuesday, the board meeting, you say this went until 12:30?

A Yes.

Q Was there a resolution of the Hinkle-Doyle incident?

A I believe at that time, sometime between 4:30 and 12:30, it was decided that both teachers would be — the

suspension would be lifted; they would go back to teaching at the school and there would be no record in their personnel files of this suspension.

Q Was that the board's decision?

A This was Mr. Ralph's recommendation and we agreed with him; we supported him.

Q Mr. Ralph was in the meeting at the time?

A Yes, he attended that meeting with us.

[336] Q And it was his recommendation that the suspension be removed?

A Right.

Q You followed that recommendation?

A Right. We understood there had been a demand for an apology from him. We felt that he had been fulfilling his responsibilities and there was no need for an apology from him to the teachers.

Q Well, did any members of the board feel that Mr. Ralph had acted improperly?

A No, we did not.

Q None of the board members said anything to lead you to believe that or told Mr. Ralph that he acted improperly?

A No.

Q Did the board of education attend any other negotiating sessions after that, any sessions with teachers?

A Yes. That was not a negotiating session. We did not attend any negotiating sessions. We made Bob Baker our deputy to do that, our negotiator.

Q And, as far as you know, Mr. Ralph also served on that negotiating team?

A Right. They needed a resource person who was familiar with the facts and figures of the Mt. Healthy school system. Bob Baker is not from our school district.

Q Now, getting to the non-renewal of Mr. Doyle's con-

tract: Did [337] you participate or did you make a decision regarding his contract?

A I would like to point out at this time that I was not present at the March 1971 meeting at which the vote was taken not to renew these teachers. I was in North Carolina when my father was being operated for cancer. I believe you have a copy of the official minutes of that meeting.

I was chairman of the education committee, yes. This had been discussed in committee of the whole at many meetings during the month of March.

Q Now, you did not attend the formal board session where the action was taken?

A Correct.

Q You did attend?

A Committee of the whole.

Q Committee sessions?

A The evaluation meetings, the five meetings that we held to evaluate the school staff.

Q Well, did you make a decision at these meetings with respect to Mr. Doyle?

A We concurred with the recommendations that were made to us. There was much discussion on them. We were concerned with all of them.

Q How many meetings were there in March prior to the public [338] board meeting?

A I have to have my calendar. I believe it was March 1st, 3d, 5th and 8th. We had to complete our evaluations prior to the public meeting.

Q It's your recollection there were four meetings?

A Five.

Q 1st, 3d, 5th and 8th?

A Is that right? Five, 1, 3, 5, 8 — Oh, there was another one about the 10th or the 12th. I believe it's in

the — As I say, I would have to have my calendar. It would be in a copy of the meeting we held in the high school cafeteria, which was our public meeting. We transferred it to the high school cafeteria at sometime after these teachers were not rehired. There was a public meeting and those dates were mentioned.

Q Tell me, do you know how long each of these meetings lasted or how long they generally lasted?

A Oh, yeah; four hours, 7:30 to 11:30 was average; and about three of them were on teacher contracts and about two of them would be on extra duty, paid extra duty assignment evaluations, whether to renew those contracts or not.

Q Could you tell me how many of the meetings centered on the employment or reemployment of high school teaching personnel?

[339] A Probably part of two evenings.

Q I take it in these meetings you review all teachers in the schools, over 300 teachers?

A Over 300 teachers, and the principals were scheduled approximately a half hour apart at the elementary level. As the staffs grew bigger, there were two high schools and then the senior high school would have taken more than one evening, part of more than one evening. What the exact time was I don't recall.

Q Part of more than one evening?

A Right. There was one evening plus, but not necessarily all of two evenings.

Q Do you know who attended the meetings?

A All the school board members, Mr. Ralph and the principal and any assistant principal whose staff we were reviewing.

Q As to the high school, who attended those, that meeting or those meetings?

A To the best of my recollection, it would have been

Mr. Stragand, Mr. Shell and Mr. Peters — and Mr. Barnes, if I didn't mention him. I believe he and Dr. Keye may have been there; but whether they were able to attend all those meetings I don't know.

Q What, if anything, did Mr. Stragand say during that meeting?

[340] A He and his assistant principals took turns going down the list alphabetically of the staff and indicating whom they would recommend that we would hire next year, whom we would recommend be commended and whom we would recommend not be rehired; and there was special attention placed on anybody who would be eligible for a continuing contract.

Q This committee was composed or consisted of all board members?

A Right, whenever we discussed evaluations.

Q Five board members and Mr. Ralph was there also?

A Right.

Q So that the evaluations of teachers were presented to all in attendance; right?

A Right. Since everybody was very much concerned with staff, they attended not just — We did not hold any education committee and then do this and then the education committee present the report to the committee of the whole as we did, say, with the transportation or lunchroom committee.

When evaluations come up in March the board meets as a committee of the whole of the education committee, and everybody was present and part of the evaluations.

Q Is this a joint decision then of the committee?

A It is unanimous.

[341] Q As to the contracts to be non-renewed or renewed?

A Right. This is the opportunity to raise questions

and, as I remember, all our decisions were unanimous on renewing or not renewing, commending, et cetera.

Q Now, were there any recommendations made at that meeting respecting Mr. Doyle or other teachers?

A The teachers of the high school staff who were not of a quality to be returned as teachers the following year, they would point out why these were teachers who were not strong enough to come to be recommended to us by the superintendent to be rehired.

Q Are you saying that the superintendent and the principals make up their mind prior to coming in and present something to you at the meeting?

A The principals, of course, know what they are going to recommend before they come in. They have to be prepared. The superintendent may or may not be aware ahead of time who is not going to be rehired the next year.

Throughout the year we are kept informed, if there are teachers, for instance, who are doing an outstanding job in some area or who are doing a very poor job in some area, so that we are aware through their principal, their monthly principal reports — if the principal feels the need to mention this person in writing, we are aware of this.

[342] And we often ask about such a teacher at these evaluation meetings. They will comment, for instance, on a new teacher has discipline problems or they will say that so-ad-so has an excellent reading program and they are going to test and see if it would work with all the students in that grade.

Q So there is a monthly principal's report —

A Right.

Q — that is presented to the board on good and bad points of teachers throughout the school year?

A Right; good and bad programs or any community

activities which the students are involved with or the work they are doing, for instance, to help with operating levies or bond levies. Anything unusual or out of the ordinary is usually brought to our attention.

Q This is prior to the committee meeting?

A Right. It comes to us in written form.

Q Are these records maintained? Are they kept over the years?

A I presume. I don't think they throw anything away.

Q Do you know if Mr. Doyle's name came up on any of the monthly reports submitted to you during the 1970-71 school year?

A I don't remember if it was 70-71 or not. I know Mr. — I [343] reread Mr. Stragand's monthly reports for those two years and, as I say, I don't remember the date, but he did mention that Mr. Doyle was doing a good job with individualizing instruction in this one area of bookkeeping.

Q Is that the only thing you recall on the monthly reports?

A Relative to Mr. Doyle, yes. I know in 69-70 he did mention teachers that were not doing well in his January report and that we needed to be concerned whether these teachers should be rehired the next year or not.

Q This is 69-70 though?

A Right. Well, January '70.

Q O. K. And Mr. Doyle's name did not appear on that list?

A No. That was 69-70.

Q Did he submit a similar list in January of 1971?

A It was not a list. It was just calling our attention to three teachers that were obviously having such problems teaching that they probably should not be rehired for the following year.

Q Now, this is January of 1971?

A 1970.

Q Oh, O. K. Let's go to January of 1971.

A Right.

[344] Q Did Mr. Stragand repeat the process?

A He did not mention names, no. I read the reports.

Q He didn't mention any names?

A No.

Q He didn't mention Mr. Doyle's name?

A No.

Q He didn't mention the cafeteria, the incident with the students and the gesture in those reports?

A No, he did not. I reread them. He wrote a two or three-page report which summarized the teaching areas, extracurricular activities, the plant, the building plant problems that needed to be attended to, et cetera.

Q And has pointed up problems with teachers also?

A Occasionally, you know, good things or bad things he would call to our attention.

Q Throughout the course of the year?

A (Nodding.)

Q Was the WSAI incident brought to your attention before the committee meeting by Mr. Stragand?

A Not by Mr. Stragand and not in these written monthly reports. It was brought to our attention I believe by Mr. Ralph. In other words, we were aware when it had happened, and I don't believe it was Mr. Ralph alone. I believe some of the other board members had heard the broad- [345] cast and were concerned about it.

Q Now, had you been made aware of what has been referred to — You have been in the courtroom for the duration of this proceeding?

A (Nodding.)

Q — spaghetti incident with Mrs. McMullen? Now,

was that communicated to the board through the monthly reports?

A No. We were made aware of it sometime when it happened but, as I say, not in the monthly reports.

Q It was not in the monthly reports?

A No.

Q You say you were made aware of it?

A Yes.

Q In what way?

A That this had happened between him and, not Mrs. McMullen, who is the head of the lunchroom program and the head school dietitian; it had happened, we understood, between Mr. Doyle and whoever was taking the money, one of the mothers or retired women that work in our lunchroom. There had been some sort of a confrontation about a second portion.

Q About a second portion of food?

A Right, whether he should pay for it or not. And we were aware that some of the teachers were unhappy about the school lunchroom [346] program, possibly the portions, the quality of food.

We are limited by state law. We are part of the federal type aid lunch program. We have to conform to their standards in the portions we serve. We are not permitted to sell plate lunches to teachers at the same price we sell to students. We are required to charge 15 cents more than the highest student price, because we do not receive federal subsidy for adult lunches.

Q In any event, you were made aware that there was some difficulty; right?

A Right.

Q How many employees does the Mt. Healthy school system have?

A Total, at that point about five to six hundred. There were over 300 teachers.

Q Over 300 teachers and nearly 300 non-certificated employees; right?

A Lunchroom —

Q I take it there are in the course of work differences and disputes that occur between employees of a number of five or six hundred?

A Right. And because the Teacher's Association wanted to meet with us so often, these other groups of noncertificated employees wanted to come in and meet with us. And at this point we realized we could not [347] deal with each group; it had to be through Mr. Ralph or the negotiating problem with Mr. Baker.

Q So then the new image or the new policies of the Teacher's Association led to even more concern, more time expended than just with that Teacher's Association?

A Right. As I say, there were attempts to unionize our noncertificated personnel. We became involved in negotiations with them. It became a question of what the board should and should not be doing directly with its employees and what should be going through the superintendent or our lawyers.

Q Well, are you frequently made aware of employee disputes, disputes, problems, that occur between employees in the system?

A Yes. We have almost monthly meetings of transportation, building and grounds, lunchroom, finance, policy committees. If we hold such meetings, either before the meeting officially begins or not, there will be discussion of what's going on right then and there.

Q Personnel problems, I take it —

A Right.

Q — which include disputes between employees of the system?

A Right; and also some outstanding things that people were doing.

[348] Q I take it there were many employee disputes in a system that size?

A Not many, not that we were aware of.

Q These are brought to your attention when they occur?

A That's right. As far as an accident with bus drivers, they inform us immediately because we get calls from parents. We got many calls when the school was closed down.

Q I take it you were not particularly pleased about the calls you received?

A We were not pleased that the teaching was not going on in the high school and that a teacher's meeting was being held during teaching time. And when the children wer sent home I was concerned about their safety.

I was out on Adams Road myself, and these were students who normally rode buses for a long way and evidently did not wait for the buses to come. It took awhile to contact the drivers and to get the buses there. And the parents called us for weeks after that commenting on the fact that teaching was still not going on in many classes for the rest of that week. They were still discussing the slapping incident.

Q "They," meaning the teachers?

A The students, and teachers were permitting it to happen in [349] some of their classes and answering questions in some cases, were still harping this thing out and still aren't teaching Tuesday, Wednesday, Thursday and Friday.

Q I take it these complaints were about many teachers?

A Many teachers at the high school by many parents. They contacted I understand almost all the board members at one time or another, or they would corner you at P.T.A. or a band meeting or an athletic meeting or whenever they met us on the street.

Q Getting back for a moment to the meetings which occurred in March of 1971 —

A Right.

Q — committee meetings, what, if anything, did Mr. Stragand say about Mr. Doyle?

A I am sorry. I couldn't remember whether it would have been Mr. Stragand said it, Mr. Shell, Mr. Peters or Mr. Ralph; but I know we were told that he was an immature person, that he was emotional; he did a satisfactory job in his classroom with his students and with F.B.L.A.

But the specific incidents that you have gone over with other witnesses were mentioned to us, that these were actions, behavior unbecoming a professional teacher; and for this reason Mr. Ralph recommended to us that we not offer him a continuing contract.

[350] Q Well, let's go through this a little slower. You say you were advised that he was immature?

A Right.

Q Who advised you of that?

A That I was aware of myself from having observed him attending meetings and from —

Q You were aware that he was immature from observing him where?

A Speaking.

Q At what meetings?

A At the school board meetings.

Q On behalf of the association?

A Yes. I was also aware —

Q You were aware he was emotional?

A Definitely.

Q Before you came to this meeting you were aware or at least it was your belief that Mr. Doyle was immature and emotional?

A Yes, from my personal observations when I had met him, spoken to him or observed him in action.

Q Well, before this meeting your contacts with Mr. Doyle in action were relative to associational activities, were they not?

A Not totally. I had two daughters —

Q But in many cases that was where you had contact with Mr. [351] Doyle?

A Monthly, yes, but I attended — I had many other meetings to attend at the high school.

His classroom is right there on the first floor opposite the school office. I had two daughters in the high school. I had many reasons to be in and out of that building.

Q Well, certainly it was more than once a month that you came into contact with Mr. Doyle —

A Yes.

Q — relative to his associational activities?

A Yes.

Q In fact, in February of 1970 you came into contact with Mr. Doyle very frequently —

A Right.

Q — did you not?

A Right.

Q O. K. So that before you attended the committee meeting it was your opinion, based upon some things that you had observed Mr. Doyle doing, that he was immature and emotional?

A Right.

Q Now, did you have any other opinions of Mr. Doyle

before you considered the renewal or non-renewal of his contract?

[352] A I had heard him called a liar, and I had occasion to have an incident related to me about — I was questioned by a teacher on something he had said. This concerned me very much, that a teacher who had been with us for that length of time was a liar.

Q Now, you say someone told you Fred Doyle was a liar?

A I was in the high school office on a flower sale. We were raising money to complete the courtyard at the high school; no tax money to complete the courtyard. So I was in and out of that building quite a bit in those two years.

Miss Fredricks, head of the math department that year, asked me if it was true that the board would no longer pay for teachers to attend professional meetings, and I asked her what she was referring to; and she said that Mr. Doyle had told the teachers that the board would no longer pay for them to attend any professional meetings.

She normally attended one or more a year, to improve her teaching of math. The board had made a change, I believe it was the 69-70 school year, we had so many more teachers and our budget is limited. We are in a low-income district. We cannot grant all requests to attend professional meetings.

So that year I believe it was the board determined that we would [353] not pay the expenses of teachers going to teacher association or Ohio Education Association meetings. We would only pay for professional meetings that furthered the teachers' classroom teaching material, ability to teach their students. So if it was the O. E. A. or the N. E. A. committee or their annual convention, we would not pay their expense. We would excuse them from class.

We would recognize this as a legitimate reason not to be in class, but we would not pay their expenses.

And I clarified this with this math teacher and her request which she had already submitted to attend a meeting almost within a week was approved, and she went. But evidently he had misled these teachers.

Q You never asked Mr. Doyle if he had misled any teachers?

A No. Miss Fredricks gave me —

Q You talked to one teacher —

A Right.

MR. BURKHOLDER: Objection, your Honor. He will not let her finish her answer.

MR. SGAMBATI: I thought she was finished, your Honor.

THE COURT: Go ahead.

Q Go ahead.

THE WITNESS: I am confused. Can you refresh me what I [354] was saying?

(Record read.)

A I knew Miss Fredericks quite well. My daughters had — My eldest daughter had her in math. She is one of the older teachers. She is approaching retirement now at the high school. We never had any reason to doubt her word.

Q Did you have reason to doubt Mr. Doyle's word?

A I had been told he was a liar. To me this was an incident that proved it.

Q Who told you he was a liar?

A Several people mentioned it. I believe that Mr. Morris specifically, I can recall his saying so.

Q Mr. Morris, being the president of the board of education —

A Right.

Q — told you Mr. Doyle was a liar?

A Yes.

Q He was upset about that, wasn't he?

A He certainly was. We do not consider that professional standards for a teacher to be a liar.

Q Did you have any other opinions of Mr. Doyle before you attended the committee meetings on his nonrenewal?

[355] A Before attending the evaluation meetings?

Q Right. We were talking about those. Already you have said you thought he was emotional and immature and you heard he was a liar.

A Yes. Those three would be the main things prior to their presenting information that night, yes.

Q What information was presented that night?

A To the best of my recollection, they mentioned the cafeteria incident.

Q The cafteria incident, meaning —

A Where he directly had a confrontation with a lunchroom worker. If the teachers have something they disagree with another school employee, they should go to the principal. If Mrs. McMullen had been there perhaps he could have questioned her about it. She was not there.

Q She was not there?

A No. I understand she got in on it later. In other words —

Q Now, this is something which had occurred during the preceding school year, was it not?

A Correct. We were concerned about this type of behavior continually, jumping into things, acting without thinking, which the cafeteria incident I would consider one example of such behavior; the obscene gestures to the students in the snack bar.

[356] Q Did you know about that before you went to the meeting?

A Yes — or I don't know whether — I believe so, yes.

Q Well, did the discussion start out with the proposition that "Mr. Doyle is immature and emotional and let's find out what instances support that proposition"?

A This was a teacher who was not being recommended to the board by Mr. Ralph for a continuing contract because after, I believe it was, five years' experience with the school he did not show the maturity we would have expected of a 29-year old teacher who had been with us for five years. We felt at this point we could not retain him for the rest of his teaching life.

Q Were you a member of the board when he received merit pay?

A I believe it was the year before or part of that year; and merit pay is something you give — used to give; we no longer do — as a reward for being commended as a good teacher for one particular year. You don't go on saying you are getting merit pay from then on.

Q I think that occurred after three years of teaching?

A Correct; which it would have been what, 60 —

Q Which would have been after the 68-69 school year for the [357] 69-70 school year.

Now, you were on the board of education, were you not, during 1969?

A He was commended before I came on the board. I believe their contracts run August to August, so his pay would have begun the August before I was on the board. I am not sure of that.

Q When did you some on the board?

A January '68.

Q January of 1968?

A Right.

Q I believe Mr. Doyle received his commendation in June of 1968, which is after you came on the board?

A Possibly. As I say, I would not have been familiar with him. I was not too familiar with the whole system. It takes a year to really learn what your job is.

Q But the board of education particularly participates in the commendation of teachers, does it not?

A (Nodding.) And a novice board member often spends the first year listening and learning and does not too actively participate in differences of opinion or personal feelings in different areas until they find out what board policy is, what school law is. It takes quite awhile to learn all that. There is no school to go to be a school board member.

[358] Q I recognize that, Mrs. Haupt. Well, were there — Strike that.

Were you aware that he had received merit pay?

A In '68, no, I was not until —

Q Did you subsequently become aware of that?

A When there was a public meeting at the high school cafeteria after he had not been rehired. After the April 15th letter had been sent out giving the reasons why he had not been rehired and we understood he was challenging this, I went back over the records to find out, since I understood he was mentioning the fact that he was a merit pay teacher, how could we possibly relieve a teacher who had been commended. I went back over the records.

I was concerned about everybody's misunderstanding of this. You may be commended one year. I don't believe there are six teachers in our entire system who are commended regularly year after year. People shine one year but do not continue to be commended every year. They

may be commended two years later, three years later; sometimes never again.

Q Are you saying that the increment doesn't continue?

A The increment does continue because you don't punish a person by taking away a five percent pay increase they got, the one step up [359] on the professional teaching salary. You don't take it away from them after one year.

Q When you give them this merit pay, it's your belief — It was at least the belief of the board of education, was it not, that this was something that would be afforded to Mr. Doyle certainly for as long as he remained in the system?

A You could not punish them by taking away what you have just given them, no. To my knowledge we have never docked any teacher. When you place them on the salary scale, that's where they stay.

Q The fact that he had received merit pay was not brought up at the board meetings or the committee meetings in March?

A No. We don't normally say this teach was commended last year or two years ago. We go on their teaching that year because often you also have a change in principals or assistant principals.

Q Well, is that what you did for Mr. Doyle —

A Yes.

Q — his teaching for that year?

A Right. Now, we had —

Q Well, why was the incident brought up about the cafeteria?

A Because we remembered this. We asked about it. We discussed this.

Q You discussed it in March of 1971?

[360] A Right.

Q This had occurred the school year before, 69-70 school year?

A Right. There were some questions about this and, as I say, I am not real sure of the date. Unless you have it, I don't know what it was. We were concerned with this —

Q Well, I think it was in fact during the previous school year.

A Fine. So was the slapping incident.

Q Tell me, what other subjects were there, and in particular from Mr. Stragand?

A As I say, I don't know whether it was Mr. Stragand says this or not. You have I believe our composite sheets, evaluation sheets. It was a very small box where we make our personal notes as each teacher is discussed. So who said it, I don't know, but somebody there discussing Mr. Doyle. The immature, unprofessional handling of the lunchroom incident was mentioned with the lunchroom employee. The call to WSAI was mentioned, that this was not what a professional teacher does when the question of dress is being handled by a committee of teachers and administrators; and they worked out a dress code that was subsequently adopted by the board in May '71 as the dress code.

It's just been revised again this year. But this was a concern [361] of teachers and administrators, and we asked them to sit down together and draw something up, recommend something to us.

Q You mentioned the WSAI incident?

A Right.

Q That was discussed?

A The fact that this is how he had chosen to handle the dress code. To me this is undercutting the Teacher's Association. They were sitting on that committee, decid-

ing what should be put in writing about a dress code for the teachers. We were concerned about it.

The parents often call us about the dress of teachers. When mini skirts were raised we had many calls. When pantsuits came in, which was one of the disputes this year specifically, many places of business, many professional offices were not yet permitting their employees to wear pantsuits. This is an area of debate.

So we turned it over to teachers and administrators to sit down together and make some recommendation to us. The board itself does not write a dress code, for students or teachers.

Q In any event, the WSAI incident was discussed at that meeting?

A It related to the dress code, yes.

Q What else was discussed?

[362] You said the cafeteria incident with the spaghetti portion was discussed?

A Right.

Q What else was discussed?

A The obscene gesture to the students as a matter of disciplining them when they left the snack bar. This was discussed as being an unprofessional way to handle — to discipline children. You don't descend to the gutter with them and use their obscene gestures. A teacher should be able to handle it in other ways.

Q Were you aware of this before that meeting?

A Yes. This had been mentioned to us sometime around the time it happened.

Q It had been mentioned to you?

A Yes.

Q By whom?

A I don't know. I believe Mr. Ralph, but I couldn't say for sure.

Q It didn't appear on any reports though, did it?

A No. Our evaluation reports, other than the score, you see the numerical scores, are reports that are verbal.

Q No. You indicated there were principal monthly reports that [363] were forwarded to the school of unusual incidents?

A Yes, normally they were verbal.

Q Did Mr. Stragand talk about the gesture incident?

A Whether it was he who discussed it —

THE COURT: That's the fourth time this witness has been asked to identify a statement to a person. This is the fifth time. She said she can't do it. Now, why do you keep asking it?

MR. SGAMBATI: Well, the question is this, your Honor —

THE COURT: What's the point? We will be around here to Christmas on this case.

Let's take a 10-minute recess. Let's not be repetitious.

(Recess.)

Q Mrs. Haupt, I believe you were saying or that there was discussion of the WSAI incident and the confrontation with the lunchroom worker?

A Right.

Q And also the gesture incident?

A The obscene gesture to the students, yes.

Q Anything else discussed?

A I believe that was all.

Q Was the Hinkle incident at all discussed?

[364] A No, it was not to my recollection. There was a comment made that, as I said again, he was such an immature person; he overreacted in so many instances, even though he had been spoken to by Mr. Stragand and had been advised to control himself better.

Q You were told that he had been advised to do that?

A Yes.

Q But as you recollect, the Hinkle incident was not discussed?

A At the evaluations, I don't remember if it was. I don't believe it was.

Q Anything else discussed about Mr. Doyle?

A Not that I remember.

Q Was there any mention whatever of his teaching ability?

A Yes. This is always mentioned, that he was doing fine in the classroom. It was in the other areas in his personal relationship with students or faculty members that he was so immature, he didn't seem to be improving, as it had been suggested that he had tried to improve these areas

Q And you don't recall who said Mr. Stragand talked to him?

A No. I am sorry.

[365] Q But that his classroom teaching was fine?

A Was satisfactory (nodding).

Q You don't recall that he was told or that it was discussed that he was a fine teacher?

A No. I don't remember the word "fine" being used, no.

Q Do you recall any discussion of his activities outside the classroom, school-related that is?

A I mentioned that he was doing a fine job with F. B. L. A. We were told, for instance, the day they worked at Frisch's that he had been right there working with the students and they had done a great job that day. They raised money I understand for scholarships.

Q So that you were aware at least at that meeting that he was doing a fine job with F. B. L. A.?

A Right, as a major fund-raising opportunity that no other school club had.

Q Were you aware that he founded that club?

A No, I was not.

Q Were you aware that he was advisor to that club —

A Yes.

Q —for five years?

A Not for five years; for those two years, yes.

Q That you were on the board?

[366] A Yes, that's right.

Q Was there any discussion about his community activities?

A No, not that I remember.

Q Were you aware of any of his community activities?

A No, not beyond F. B. L. A.

Q You weren't aware of any of his scout activities then?

A No, not until after we did not rehire him.

Q Did you review his evaluation forms during that meeting?

A No. We did not normally handle those sheets at all. We simply had our summary sheets. This would have been physically impossible to read and handle all those sheets during those three evenings.

Q Do you recall how long Mr. Doyle was discussed?

A I couldn't say. Less than half an hour probably.

Q Less than half an hour?

A Probably.

Q And your recollection is that there were several incidents discussed, also the fact he was a good teacher?

A Right.

[367] Q F. B. L. A. activities were good?

A Right.

Q And that's all?

A That's right; but that this was not a quality teacher

who we would wish to hire on a continuing contract. This was not a beginning teacher. If it were a first or second year teacher, you often make allowances for weaknesses such as immature, and you expect these things to improve with passing of time. You do not hesitate on giving a one-year contract the way you do on giving a continuing contract.

Q I think you testified that Mr. Ralph had recommended against affording Mr. Doyle a contract?

A A continuing contract. That was all that was under discussion.

Q There was no discussion of the possibility of another limited contract?

A No. You make up your mind at this point if you are going to keep the teacher on a continuing contract or not. By this time you should know if this is a quality teacher you want to keep.

Q When you say "you," you mean your particular board of education —

A Right.

Q — was deciding only if he could be provided a continuing contract or should be provided such a contract?

[368] A Right. We make the decision to keep them or not to keep them at this point when they are up for a continuing contract.

Q Was anyone else up for a continuing contract?

A Oh, there were several every year, yes.

Q Do you recall anyone in particular that year?

A No. I am sorry. Not that year.

Q Did Mr. Ralph make the recommendation at that meeting —

A Yes.

Q — or after the meeting?

A No; at that meeting, at that time, because each teacher — we conclude our discussion on each teacher, we decide

to give them another one-year contract, a continuing contract or terminate teaching; or in between all these things, whether this teacher is to be commended or not.

Q When you say "we decide," are you saying that the entire committee decides?

A Right. All five board members decide to accept or not accept the superintendent's recommendation.

Q When did Mr. Ralph make his recommendation during that meeting?

A When we finished discussing Mr. Doyle.

Q Did his recommendation surprise you?

A No. We had been aware of these incidents throughout the [369] years so we were aware this was a possibility.

Q Well, was it your belief when you began discussions on Mr. Doyle that he would not be renewed?

A We were aware this was a possibility, yes.

Q You were aware that it was a probability?

A Yes.

Q So that Mr. Ralph's recommendation did not affect those probabilities, did they?

A Of course they do.

Q Had he recommended otherwise it would have surprised you?

A Yes. The way sometimes we have been informed by principals throughout the year that teachers have certain weaknesses, and we ask, you know, if you are recommending that we rehire this teacher the next year, why, what progress, what changes have they made that warrant their being with us for another year.

Q Well, did you make your recommendation — or did you make your decision on Mr. Doyle as a result of Mr. Ralph's recommendation?

A On the basis of all the information we had about him as a teacher.

Q Including that recommendation?

A Including that recommendation.

[370] MR. SGAMBATI: No further questions, your Honor.

* * *

[379) **William M. Morris**

called as a witness by the plaintiff, being first duly sworn, testified as follows:

CROSS-EXAMINATION

BY MR. SGAMBATI:

* * *

[394] Q Mr. Morris, did you attend the committee meetings on the review of teacher contracts in March of 1971?

A Yes.

Q Do you recall how many there were?

A Oh, I would say four or five at least.

Q Four or five?

A (Nodding.)

Q You attended all of those?

A Yes.

Q Was Mr. Doyle discussed at any of those meetings?

A All teachers are discussed, their evaluation.

Q Well, was Mr. Doyle discussed?

A Yes.

Q Was he discussed at one meeting or more than one meeting?

A If I can tell you the procedure, I think it would answer the question.

Q Go right ahead.

A All the teachers within a given building are presented and the people involved in that building are present. So in the case of Mr. Doyle, his name would have been presented along with all of the high school [395] teachers initially; and then any situation which the board would get involved in a question and answer period, such as there would be teachers from time to time recommended for non-renewal, there would be teachers recommended for commendation, and these people are brought back before the board for discussion.

So in the case of Mr. Doyle, the year that his contract was not renewed, he would have been brought before the board at least twice.

Q Would that have been first during the normal course of review and secondly the wrap-up to make a final decision on that?

A Right, but when you take the people who are getting different attention —

Q Mr. Doyle received different attention?

A He and all the other people — For example, that year there were 10 people not renewed.

Q Ten out of about 300?

A That's approximately. So all 10 of those would have been brought back to the attention of the board. There were approximately, if I recall, approximately 35 teachers got letters commending them for various things, and they would have been brought before the board.

Q Did Mr. Hinkle receive a letter that year?

A I couldn't say who were on the list.

Q You don't recall him receiving a commendation letter, a letter [396] commendation the year before, do you?

A Mr. Hinkle?

Q Yeah.

A No.

Q He may have?

A He may have.

Q Who attended the committee meetings when the high school teaching staff was discussed?

A Are you talking about the evaluation?

Q Yes, the committee meetings, yes, in March of 19 —

A The evaluation of the teachers?

Q Right.

A All the board members and the superintendent, the principal and assistant principal of the high school, the director of personnel and the director of curriculum.

Q Did Mr. Ralph attend, Mr. Stragand attend?

A (Nodding.)

Q What points, if any, did Mr. Stragand make about Mr. Doyle?

A Well, I couldn't sort out his specific words but, generally speaking, he commented — He presented the fact that Mr. Doyle was an adequate or more than adequate teacher within the classroom, that within the classroom he had good rapport with the students, on his plus side.

[397] On his minus side that he had not improved in his development of maturity, in his tactfulness, within the professional realms of the teachers. So he presented both sides of the coin.

Q Well, did he recite any specific instances?

A Well, through the evening — He didn't necessarily recite incidents. People asked. We were all aware of incidents that happened back through the year.

Q You were —

A And the preceding year in fact.

Q You were well aware of the incidents which involved Mr. Doyle?

A Right, or any other teacher we may question during the evening, but those sort of things are brought forward.

Q Well, do you remember members of the board, and that would include yourself, asking specific questions about specific instances?

A Yeah. We asked, for example, in relation of the things such as his handling of pupil discipline; has he matured; has he grown; has he become better at it. And the answer was: "No, he has not matured; he has not improved."

I am not saying those are the exact words, but in relation of the information that was exchanged.

Q You say that he was asked those kind of questions without [398] someone saying that he is immature or that he is emotional? You were aware or at least believed that he was emotional or immature?

A I personally?

Q Yeah.

A Definitely. I had evidence back from my various contact with him that — in fact, from your questioning previously, I contacted him at that one meeting and we discussed his tactfulness and so forth.

Q Well, his tactfulness and his emotions — I take it you never viewed him in the classroom?

A Have I seen him in a classroom?

Q Yeah.

A I haven't been within the classroom, no.

Q So that your opinion of him comes from your observations of him as a member of the association?

A Oh, no. Goodness, no. I am around that school many, many hours in a year's time.

Q Well, what in particular other than your contacts with him when he was president of the association and as an active member led you to believe that he didn't have tact?

A Well, before he was a member, an active officer with-

in the association, he was a teacher within the school previously. He taught be- [399] fore he was active, and so he was observed teaching.

Q And during those years in fact he received a letter of commendation for his performance up to the time he became association president; is that right?

A We were both talking at the same time. Now, will you repeat the question?

Q I am asking you that you said he taught in the system before he became the association or the association president?

A Yes.

Q I am asking you about the recommendation or commendation given to him —

A Yes.

Q — for those years prior to —

A For one year.

Q For one year?

A Right.

Q You are aware that he was evaluated?

A Every year.

Q And that he received strong evaluation, are you not, for the first three years of his teaching?

A For his classroom teaching.

Q Yes.

A He was also noted in all of his evaluations of his emotional problem.

[400] Q In all of his evaluations he was noted?

A Yes, through conversation from the board. This was a known conversation request, that emotionally he had problems with the students and staff.

Q And yet you renewed his contract on at least three occasions, did you not?

A Oh, sure. We hope the teachers will improve; and

we were sure or we were told that there was definite evidence that he had the possibility of improvement. His teaching within the classroom verified that.

Q So that there was no question about his classroom teaching?

A He did improve in his classroom work, yes.

Q He improved in his classroom work?

A Right.

Q Are you aware that his evaluations fell?

A The last year.

Q Not drastically, but certainly dropped somewhat?

A Last year I believe it fell. That I noticed.

Q And yet you say he improved in his classroom teaching?

A I was talking about what you was referring to him beginning and being offered contracts.

Q Did you have an opinion, a fixed opinion, about Fred Doyle when [401] he walked into the meeting? I am talking about the committee meeting.

A I had knowledge of things that I would ask questions on.

Q Will you describe generally what comments were made about Fred Doyle and by whom?

A Oh, I couldn't tell you who made which statements four years ago.

Q Do you recall generally what was said?

A Just as I repeated them now.

Q Were any specific instances cited or didn't you need those specific instances?

A No. We were — I personally was aware of these various things that had come up through the year.

Q Were you aware of the WSAI incident?

A Yes, sir.

Q How did you become aware of that?

A Through student conversation. I had a student in the school at the time and young men and girls were in my home often, and I had calls from parents.

Q Tell me, was the WSAI incident discussed at that meeting?

A Not as such, no.

Q Not as such?

A No.

[402] Q What do you mean, "not as such"? It was discussed?

A Well, I think in the back of my mind was the fact that the thing that I mentioned, tact and maturity and that sort of thing, I think everybody was —That would have been something that you would have kept remembering to ask about whether there was an improvement of maturity or tact or professionalism and all these things that we had discussed.

Q You say you asked a question whether there had been improvement?

A Right.

Q But at the same time you knew already about WSAI, did you not?

A Yes.

Q Did you know about that gesture incident?

A Yes.

Q Why did you ask if there was improvement —

A Well, certainly —

Q — if you knew those things?

A Well, the things didn't happen the week before our evaluation.

Q Pardon me?

A The person came through within the year.

Q Well, the WSAI incident occurred shortly before your —

[403] A Yes.

Q — meeting?

A Well, that wasn't the only thing that was discussed or thought about.

Q Was the gesture incident discussed?

A I don't recall now specifically if that very gesture was talked about as such. I couldn't tell you that. I don't know that anyone said, "Do you know about this, that or the other incident?"

Q You don't know if anyone said about that or you don't recall it or what?

A No. I am saying that no one questioned whether or not these things happened. Everyone was aware that these things had happened and so the conversation was more about the improvement of the person; has there been improvement in his behavior or his contact with students, his contact with staff.

Q Was the Hinkle incident discussed?

A Not the Hinkle incident, no.

Q Was any incident discussed in particular?

A Well, no. When you evaluate a teacher, you evaluate their ability within your school system.

Q Were any incidents or instances specifically recited?

A No.

[404] Q No?

A (Shaking head.)

Q There was just an opinion that Mr. Doyle wasn't mature or didn't have tact; therefore he should not be renewed?

A Those were the questions asked; has he improved in his maturity, has he improved in his professionalism.

Q What was their response?

A The negative. Maybe they would explain the rea-

soning why. Maybe they would tell their personal beliefs of why they had not.

Q Well, again, you testified that these specific incidents were not recited or talked about, and my question is: Is that right? I mean these things were not specifically talked about during that meeting. No one said, "Remember the Hinkle incident," or no one said, "The gesture incident. He did that. He did that. He did that. He did that." That was not the topic of the conversation?

A None came out specifically and said, "Well now, you remember the Hinkle incident"; nothing of that nature.

Q Did anyone mention the Hinkle incident at all in any way?

A I don't know the type of question that you are trying to get. I thought I had answered it.

Q The question is: Did anyone say, "Fred Doyle participated in [405] the Hinkle incident," or, "Remember when he was struck by Mr. Hinkle?"

A No one said that.

Q No one said anything about Hinkle?

A No, I didn't say that. I said no one said that in answer to your question.

Q What did they say, anyone say, about the Hinkle incident?

A I recall that the only thing that was discussed was not the Hinkle incident by name, but these things weren't discussed as a recap of the incidents that happened through the years.

Q Were they at all discussed?

A Not to my knowledge, no.

Q Was the gesture incident discussed?

A Not to my knowledge.

Q Was the incident in the cafeteria over the portion of spaghetti discussed?

A Not to my knowledge.

Q You said his teaching ability was discussed?

A Definitely.

Q Were his activities with the F. B. L. A. discussed?

A Not to my knowledge, no.

Q Were his activities in the community with the Boy Scouts and [406] the Explorers discussed?

A No.

Q It's your testimony that all that was discussed was his teaching ability and some general observations about his tact in handling problems?

A No. The very things that had been presented, as I mentioned, in the way of him needing improvement, were discussed.

Q I am having difficulty understanding what's your recollection of what was discussed.

A I said his needed improvement areas were discussed. His strong points were discussed. And that's basically the amount of content that was discussed with Mr. Doyle.

Q You knew about Mr. Doyle when you came to that meeting, you said?

A Yes.

Q Do you know if the other board members did? Did they make any comments to you that they were well aware of Mr. Doyle when they came to that meeting?

A Well, they were all present.

Q Well, were they aware of these other things that occurred?

A I informed them of such.

Q You informed them?

[407] A I told them if they wanted to ask him if he wanted to come to the meeting.

Q Did you talk about Mr. Doyle when you called them?

A No. I told them the purpose of the meeting.

Q Did Mr. Ralph make a recommendation that night?

A He wasn't even there. Which meeting are you referring to?

Q I am referring to the evaluation meeting.

A Oh. Oh. I beg your pardon. I thought you said that meeting. I thought you were referring to the first meeting of the board. I am sorry.

Q O. K. How many meetings did the board have and when did they occur on the evaluation of high school teachers?

A Oh, evaluation only?

Q (Nodding.)

A Five meetings that I recall.

Q Is there a need for another meeting that you have relative to employment or non-employment of teachers?

A Not to evaluation.

Q So when we talk about evaluation we are talking about the five meetings?

A Right.

Q And it was in one of those meetings that Mr. Doyle — at least [408] one or two of those meetings that Mr. Doyle's contract status was discussed?

A Right.

Q And it's during those meetings that the decision was made not to renew Mr. Doyle?

A No. The decision is actually made with the superintendent's recommendation at the previous board meeting. These are the hearings, the evaluation hearings that you are referring to.

Q Well, the decisions are made in those meetings, are they not? In effect they are made. Certainly, there is formal board action at a later time —

A Yes, right.

Q — when there is an official recommendation from the superintendent in compliance with the statute; correct?

A Correct.

Q But the decision is made prior to that time, is it not?

A It can or cannot. It's either/or.

Q Well, it was in Mr. Doyle's case?

A I don't recall whether — I can't recall whether it was pinned down particularly, if that's the word I could use, at that particular time, but I would imagine it was. It was the last of the evaluation meetings.

[409] Q It was decided, was it not, that Mr. Doyle would not be given another contract?

A Yes, I think that was at the very last one.

Q And that was the decision of the committee?

A That was a decison on a recommendation. The recommendation will eventually come from the superintendent of schools to the board.

Q But that's at the formal meeting?

A Yes.

Q And I am referring again to the — The decision is made, is it not, at least in Mr. Doyle's case, was made at the committee meeting?

A The decision was made that he would not be recommended at the evaluation.

Q In other words, the decision was made for the superintendent of schools that he would not — that the superintendent would not recommend?

A The superintendent would get finally to the point in these evaluations where the superintendent — you're very well aware of who the superintendent will recommend for employment or non-renewal.

Q You became aware of these at committee meetings?

A Yes.

Q Then I take it you become aware also of the facts that would lead you to a decision at that time ?

[410] A Lead you to a decision?

Q Yes.

A Yes.

Q Your mind was made up at those committee meetings was it not?

A Sure.

MR. BURKHOLDER: Your Honor, I object to the repetitious nature of the questions.

THE COURT: Going round and round.

MR. SGAMBATI: Just trying to find out when the decision was made. I have some difficulty as to when it was made.

Q Did you then vote at the board meeting to nonrenew Mr. Doyle's contract?

A Yes, or accept the superintendent's recommendation.

Q Based upon what you had heard at the committee meeting?

A Right.

Q I take it over the years you haven't always followed the recommendation of the superintendent, have you?

A No. There has been times when we have disagreed.

MR. SGAMBATI: I have no further questions of Mr. Morris.

* * *

[417] **William Charles Lippmeier,**

called as a witness by the plaintiff, being first duly sworn, testified as follows:

CROSS-EXAMINATION

BY MR. SGAMBATI:

* * *

[418] Q Mr. Lippmeier, did you attend the evaluation meetings on teachers in March of 1971?

A Yes, I did.

Q Did you know Fred Doyle personally at that time?

A Yes, I did.

Q Did you know of his abilities as a teacher?

A I had never observed Mr. Doyle in a classroom teaching [419] children, no.

Q Had you been made aware of his abilities in the classroom?

A Yes, I had.

Q By whom?

A I am not sure whether it was the principal or assistant principal in the evaluation sessions; they would review his qualities in the classroom and so forth.

Q The evaluation sessions, you are referring to those in March of 1971?

A All the evaluation sessions through the years. Naturally, every teacher was discussed every year; and over the years I would imagine that Mr. Doyle had been discussed at every evaluation session. So I had sat in on five of these, five or six of these sessions.

Q So there was an evaluation session then in 1969-70, that is March of 1970?

A Yes, sir.

Q Do you recall if there was anything said about Mr. Doyle teaching at that time and, if so, by whom?

A I don't remember anything specifically.

Q Was there anything said about Mr. Doyle's teaching in March of 1971?

A The principal or assistant principal outlined that he had done [420] quite well in the classroom and communicated the classroom material to the students quite well.

Q Did you decide to non-renew the contract of Mr. Doyle? Did you participate in that decision?

A I supported the superintendent's recommendation.

Q What was the recommendation?

A Mr. Ralph's recommendation was that the contract not be renewed, and I supported the recommendation.

Q And that recommendation occurred at a formal board meeting, did it not?

A That's right.

Q Was there any recommendation by Mr. Ralph prior to that time?

A After the evaluation and general discussion we would ask Mr. Ralph what he thought his recommendation would be, and he would make this. It was not an official or formal type recommendation, but I believe he indicated that he would not recommend renewal.

Q This was after the evaluation sessions?

A Yes, it was. I am sure that it was after the evaluation session. We would listen to all the data presented by the principals and then the board would ask Mr. Ralph what he thought his recommendation would be, and he would state this. And then if there were additional questions or things like this, then the board members could question Mr. Ralph on his recommendation.

[421] Q Did you have any opinion with respect to Mr. Fred Doyle prior to the evaluation sessions in March of 1971?

A Nothing specifically. I had known Fred for two or three years, and I felt like he had certain weaknesses which it would have been much better in a teaching situation if he would have overcome.

Q What occurred at the evaluations — What, if anything, was said about Mr. Doyle during the evaluations in March of 1971 and, if you can recall, by whom?

A Again, I don't remember whether Mr. Stragand or Mr. Peters did the majority of the presentation. We sort of alternated off between Mr. Stragand and Mr. Peters. But, as with every teacher, it was outlined their strong points and their weak points that were observed by the evaluator.

And with Mr. Doyle, I am sure this was the same as with all teachers; the strong points and the weak points were presented to the board, and I am sure there were various questions and so forth from the board members to the principal relating to these.

Q Do you recall what in particular was said about Mr. Doyle; that is if there were any specific incidents mentioned, what were they and, if you recall, who talked about them, who presented them to the board?

A Again, there was just more or less a general discussion. Many [422] of the instances mentioned earlier in this proceedings were talked about; the cafeteria instances and the gestures and so forth and so on.

It was just sort of a general discussion type thing. I don't know who initiated it or if they were brought by the evaluator or prompted by who. It was just a general discussion type thing.

Q Well, were the specific incidents discussed?

A The specific incidents I think were discussed in a general manner. This is an example. I don't know that this was discussed, but take one of the cafeteria instances. Somebody would say: "Well, this is the report we have. Is this the way it happened? And what did Mr. Doyle say in reference to this and what did you tell him in reference to this?"

And it was generally that the principal had recommended that he show a little bit more strength in this area of controlling his emotions and that Mr. Doyle would answer

that he would try to do this in the future, something like this. But this is a general type thing.

Q This is what the principal said?

A Yes.

Q You didn't question Mr. Doyle about this, I take it?

A No.

[423] Q Was the Hinkle incident ever discussed?

A Not that I remember.

Q Were you aware of it?

A I was aware of it, yes.

Q In fact, you had a couple of meetings on that; isn't that true?

A That's true, yes.

Q And that was resolved eventually by a letter which was to remove the Hinkle incident or any adverse inferences as a result of it from Mr. Doyle's record?

A Yes. The letter was to remove any reference to the suspension or the incident from the personnel files.

Q So the Hinkle incident was not discussed?

A I don't believe it was; no, sir.

Q There has been some testimony about the gesture incident. Was that discussed?

A I don't remember whether it was specifically or not. The board was aware of it. The timing on this is hard to put together, there have been so many meetings and things of this. I don't know if the gesture incident was mentioned at the evaluations. I would tend to believe it was probably mentioned.

Q You don't recall specifically —

A I don't recall specifically.

Q —whether it was or wasn't?

[424] A No, sir. Not after four years and evaluating 300 teachers in that year, I can't remember the specifics of any one person.

Q You were aware of the incident though before you came to that meeting?

A I am sure I was, yes.

Q You are sure you were?

A I am sure I was, yes.

Q Were there any other incidents or anything that was discussed that you were aware of before you came to the meeting?

A Usually whenever there was an incident that affected the community or the students which in turn affected the community, every board member knew about this within a matter of a few days, either from calls from parents or from students stopping in to see your – my own children. I had two students in the buildings.

The children would come over, and practically whenever there was an incident in the high school I was aware of it within a matter of a few days, that there was an incident; maybe not the specifics of it, but that there was an incident.

Q Incidents regarding Mr. Doyle and incidents regarding other teachers?

A Yes. Whenever an incident happened at a school, regardless [425] of who was involved, I usually heard about it within a short time.

Q Tell me, Mr. Lippmeier, what else was discussed during the evaluation session, if anything, about Mr. Doyle?

A Possibly not — It may have been directed to Mr. Doyle. At the time of the evaluation I was president of the board, and I told each and every principal that came into the evaluation session that we wanted to be extremely selective in our teachers. We were trying to build up an extremely fine staff, and there were many teachers to choose from, and we wanted only the top-notch teachers; and if anyone was available — anyone was eligible for continuing

contracts, that we should take a long hard look at these individuals.

Q Is it your testimony here today that the reason Mr. Doyle was not renewed was because of these incidents?

A I personally felt because of the immaturity in him, his personality associated with these incidents.

Q Do you believe it was in any way related to his classroom performance?

A Well, here is a matter of question. I consider classroom performance not limited to the classroom but any time a teacher is with [426] the students, whether it be in the halls, whether it be in the cafeteria or whether it be in the classroom; and I lumped this altogether as classroom performance. Stature as a teacher is any time the teacher is with the students during the school hours.

Q You do recall giving a deposition on March 16th, 1972 —

A Yes, I do.

Q —about the reason for Mr. Doyle's —

A Yes, I did.

Q —non-renewal? Do you recall being asked what the reasons were?

A I said because of his classroom activities with the students, and I believe further back in my deposition I expressed the same thought that I just expressed, that I considered classroom any time a teacher was with a student.

Q But you were asked a question, "But you are sure that the reason he was not continued as a teacher was because of this classroom performance?"

And you responded, "Yes."

A In my mind, this is what I considered classroom performance, yes.

Q Classroom performance being that which occurs outside the classroom, including that which occurs within the classroom?

A Yes, the classroom — Any time the teacher is in the building [427] with students is what I considered classroom performance.

Q And you had an opinion respecting Mr. Doyle before you went to the meeting, did you not? I am talking about the evaluations.

A I can't say that I had a definite opinion. I felt like I knew his characteristics and I know Mr. Doyle, yes.

As far as an opinion on renewal or not renewal, I didn't have an opinion before I went to the meeting, no.

Q Well, did you reach an opinion as a result of what was discussed at the meeting?

A I believe I did, yes. I felt, due to the fact that it was a continuing contract, that Mr. Doyle has had trouble exercising leadership or respect from the students and that he would be the head person in the classroom; and this is the way I felt, that he — As far as the text material, everything had been indicated to me that he had done a fine job, but I felt like the students would have trouble respecting him as the leader of the class because of his immaturity in many other instances in the school situation.

Q You say you felt this?

A Yes.

Q Did anyone advise you that he in fact was not a good classroom [428] teacher or did not earn respect of his students while he was in the classroom?

A No. I believe on the evaluations that the evaluations stated that he was — did do a good job in presenting the material.

Q In fact, those same evaluations said he related well with others, didn't they, or with students?

A Right. But my opinion, I didn't feel like relating

well with students and showing — the students showing respect were the same thing.

Q When you went into the meeting were you of a belief that he lacked tact?

A Yeah, I would say that he in many cases lacked tact.

Q You had many contacts with him in association affairs; is that correct?

A Speaking at the board meetings and so forth and so on, yes.

Q Would you say he demonstrated tact while speaking for the association?

A Not at all times.

Q In some instances he did not?

A Right.

Q Was your opinion, your opinion that he lacked tact, based on [429] contacts that you had with him as a leader of the association?

A Not necessarily. I met Mr. Doyle many times with the association and outside of the association and I didn't notice any change in personality from one period to another, so it may have been a conglomerate of both.

Q Well, I think you would admit then that a certain part of the reason was — or part of the observations occurred while he was acting as association president?

A As far as his personal abilities or personality, I would say I would have to. Whenever you are exposed to a person you pick up some of his personality traits, and it's hard to separate whether it was outside of the association business or within the association business.

Q And you were exposed to him quite often when he was president of the association, were you not?

A. Yes.

Q Did you have an opinion as to Mr. Doyle's renewal

or non-renewal prior to the official board meeting of March 22d?

A The Official board meeting?

Q Yes.

A. Yes.

Q And what was that opinion?

A That he would not be renewed on the recommendation of the superintendent.

[430] Q Now, are you saying he would not be renewed because Mr. Ralph said he would not be renewed or it was your opinion he should not be renewed because of your own personal feelings or your own observations of him, or a combination of both?

A Mr. Ralph had made the recommendation that he not be renewed, and I felt like, based on Mr. Ralph's recommendation and my own personal evaluation, that this was the best thing to do.

Q Isn't it a fact that you considered yourself a strong member of the board of education?

A Yes, I did.

Q And isn't it also a fact that you did not always follow the superintendent's recommendation?

A That's correct.

Q Where you felt he was wrong you said so and you disagreed with his recommendation?

A That's true. My voting record indicates this.

Q Did you have occasion to meet with Mr. Doyle at your home the latter part of February of 1970?

A Yes, I did.

Q And was that because of the suspension of Mr. Doyle by Mr. Ralph?

A Yes, it was.

Q Mr. Doyle explained to you what had happened?

[431] A Mr. Doyle, when I arrived home from work, Mr. Doyle stated that he had been suspended by Mr. Ralph.

Q Did you make any — Did he tell you why?

A He told me he had been suspended and I can't remember the words. It was in relation to the slapping incident.

Q And he told you what had occurred during the slapping incident?

A He related the slapping incident to me about Mr. Hinkle and himself in his classroom, that Mr. Hinkle had slapped him after some discussion, yes.

Q And isn't it a fact that during this conversation you told him that you thought that Mr. Ralph had done wrong in suspending him?

A At the time he had not told me that Mr. Hinkle had been suspended also, and I felt that if only he had been suspended this was wrong, and I told him this, yes.

I did not know at the time that Mr. Hinkle had not been suspended — that he had been suspended and that the reason they were suspended was to try to resolve the matter. But at the time I told him this I did not know that Mr. Hinkle had also been suspended.

Q But at least as far as you knew Mr. Hinkle had slapped Mr. Doyle?

[432] A That's the report that I had from Mr. Doyle, yes.

Q And Mr. Doyle had refused to accept the apology of Mr. Hinkle?

A I do not remember whether this was mentioned or not.

Q But you did tell Mr. Doyle that you thought Mr. Ralph was wrong?

A I told Mr. Doyle that I thought Mr. Ralph was wrong under the circumstances, not knowing that Mr.

Hinkle had also been suspended. If just one person had been suspended I felt that it was wrong, and at the time I did not know that Mr. Hinkle had also been suspended.

MR. SGAMBATI: No further questions of this witness, your Honor.

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CROSS-EXAMINATION

BY MR. O'CONNELL.

• • •

[433] Q All right. Now, you indicated that you had children in the high school at the time —

A Yes, I did.

Q —of Mr. Doyle's non-renewal. From time to time did you get calls from parents about situations at the school?

A Yes, I did.

[434] Q Did you ever get one or more calls from parents complaining that Mr. Doyle had announced to his students that they would get an automatic "A" for working on the pancake brunch?

A I don't remember whether this was a call or a personal contact at a P.T.A. meeting, but this was related to me by a couple of parents.

Q Did you ever get a call or find out from a personal contact with a parent that Mr. Doyle had students in his class preparing some kind of posters in support of a teacher?

A Again, I don't remember whether this was from a parent or from a student, but I did have a contact.

Q What was the gist of the information that came to you about Mr. Doyle?

A I don't remember the specific instance. There was

something about a teacher not being given an extra duty assignment of not being renewed or something to this gist and that the students were putting on a large poster campaign to get the board to change their decision, and that the students — he was encouraging students to make these posters or helping them or giving them guidance or something like this.

Q Now, in the evaluations of March 1971 concerning Mr. Doyle, at no time did Rex Ralph in discussing Mr. Doyle refer to his teacher asso- [435] ciation activities, did he?

A No, he did not.

Q And at no time did Rex Ralph, or anyone else for that matter, ever say that Mr. Doyle ought to be non-renewed simply because he made a telephone call to WSAI?

A No, he did not.

• • •

[437] **Vivian V. Clark,**

called as a witness by the plaintiff, being first duly sworn, testified as follows:

CROSS-EXAMINATION

BY MR. SGAMBATI:

Q Please state your full name and address, please.

A Vivian V. Clark.

Q Your residence, please?

A 9132 Ranchill Drive. That's in Springfield Township.

Q Are you a member of the Mt. Healthy Board of Education?

A Yes, sir.

Q How long have you been a member?

A About four and a half years.

Q You were a member of the board at the time Mr. Doyle's contract was not renewed; is that correct?

A That's correct.

Q And you participated in the decision not to renew his contract?

A Yes.

Q Did you attend the evaluation sessions on the teachers at the high school?

[438] A Yes, I did.

Q Those occurred in March of 1971, did they not?

A That's correct.

Q How long had you been a board member at that time?

A Well, I took office in January of 1970. So I guess it would have been about a year and a half.

Q Did you know Mr. Doyle?

A Not personally.

Q Well, had you ever observed Mr. Doyle prior to that meeting --

A Yes.

Q --evaluation meeting?

A Yes, meetings.

Q Board meetings?

A Yes.

Q While he was speaking for the Teacher's Association?

A Yes.

Q Did you ever observe him in any other contact other than related to associational activities?

A Well, over at the high school I saw him often when I volunteered to teach students the key punch.

Q Did anything you saw Mr. Doyle do at the high school while you [439] were there teaching these students, did you believe anything that he did there was improper?

A I know there was a fight one day over there and I think he was involved with it in the snack bar. When it was over with most of the teachers went back to their classroom. Mr. Doyle I know was out in the hall. I don't know if he was on duty in the classroom or what. I have no way of knowing.

Q You observed this?

A I was over there.

Q You were in the snack bar?

A I wasn't in the snack bar. I was outside when it happened and it was a big crowd. Well, most of the teachers went back to the classroom. I know that he was a little nervous or upset or something and was talking to some teachers or someone, made a couple of comments. He may have even made a comment to me. I don't remember exactly what it was.

Q This occurred when?

A I guess it would have been in 1971 because in 1970 I wouldn't have been over there. I was just newly elected.

Q You were elected in January of 1970; right?

A I was elected in '69, took office in January.

Q '69, took office the later part of 69-70 school year?

[440] A That's right.

Q O. K. So you were a board member when Fred Doyle was president of the association?

A That's right.

Q O. K. So this incident occurred sometime between January of 1970 and the evaluation period?

A Not of that year. I think it was in '71 when it occurred.

Q The 70-71 school year?

A That's right.

Q Calendar year 1970?

A That's correct, sometime in there.

Q Did you make any comment to Mr. Doyle about whatever you observed?

A No, not really.

Q Whatever you observed didn't upset you, I take it?

A No.

Q Did you have an opinion as to Mr. Doyle's abilities?

A With regard to what, teacher?

Q Well, classroom abilities, let's say, before the meeting of March 1971 when you evaluated teachers.

A Well, when we went over him in 69-70 calendar year, of course [441] he was discussed. I don't remember what it was. I know that every teacher was discussed, and he would have been brought up at the same time. Any specifics about him, I don't remember that.

In 1971 of course he was also discussed again.

Q He was discussed in 1970 as a high school teacher?

A Correct.

Q And you don't recall anything particularly —

A Nothing.

Q —objectionable at that time?

A Well, I don't remember anything at that time.

Q Well, certainly you don't recall anything about that session or you don't recall whether there was anything objectionable?

A There might have been a few comments. I was very new at the time. Things were moving so fast at the present time because there were — Well, I don't know if there was disagreements or what but, being a new board member, it's hard to keep up whenever you are having meetings four to five nights a week. So I don't really recall any specifics about it.

Q When you went to the evaluation meeting in 1971 were you aware of this WSAI incident?

A Yes.

Q I take it you know what we are referring to —

[442] A Right.

Q — as the WSAI incident?

A Right.

Q What other incidents, if any, were you aware of?

A I was aware of the obscene gesture.

Q How would that have been communicated to you?

A I don't really know. It could have been that I had a phone call or that I called Mr. Ralph one day and someone had talked to me on the street or something and I had referred it back to him and asked him about it. This could have been how it was referred to me.

Q Well, did you have any opinion as to the renewal or non-renewal of Mr. Doyle's contract when you entered the meetings, evaluation meetings?

A Not anything specifically. Of course I knew the incidents, you know, that had occurred, but I hadn't formulated an opinion yet.

Q You had not decided whether to renew or not to renew?

A No, not at the time.

Q What prompted you to — I take it you did make a decision. What prompted you to make that decision?

A Well, the general information that we discussed at the meeting [443] and then later on, I think it was at the end of all the evaluations — I don't know if we asked. Possibly we finally pinpointed the, you know, people that were going to be released and asked, "Are these people, would you recommend that these people be released?

Q You say you pinpointed those that were to be released?

A Well, yes. You got 300 and some teachers. Somehow you have to get them altogether, which ones will be released and which ones won't.

Q When you say you pinpointed, you mean the committee?

A The entire committee of the meeting.

Q That is the entire board of education?

A And, you know, Mr. Ralph and Mr. Barnes.

Q So after you decided or came to an opinion as to which teachers would be released, you asked Mr. Ralph for a recommendation with respect to these teachers?

A In other words, would he recommend formally at our normal meetings that these teachers either be, you know, would not be rehired.

Q I take it he agreed to that and did do that?

A Yes. Basically, I mean it wasn't really — We didn't vote or anything that night. It was just more or less in a general way, and we just more or less generally accepted the fact that they would not be rehired.

[444] Q And that Mr. Ralph would make the recommendation?

A And he would make the recommendation.

Q And he agreed and did make a recommendation at the formal board meeting?

A Right, but I wasn't at the board meeting that night. I had been in the hospital.

MR. SGAMBATI: O. K. Nothing further, your Honor.

CROSS-EXAMINATION

BY MR. O'CONNELL:

Q Mrs. Clark, you were asked about an incident which occurred at the high school when you observed Mr. Doyle and others take part in calming some kind of disturbance between students, and you say you observed Mr. Doyle and other teachers immediately thereafter; is that correct?

A That's correct.

Q Now, could you give us a comparison between Mr. Doyle's condition or appearance at that time with that of the other teachers?

A Well, it seemed like the other teachers made nothing of it. Mr. Doyle seemed to be making comments to either administrators or some teachers that were standing out in the hall; and they went back, the other teachers went to their classroom. He was making comments, and [445] I know he was a little bit nervous and upset about it.

Q Would you say there was a noticeable difference, at least noticeable to you, between his reaction to this incident and that of the other teachers?

A Yes.

Q Now, you were also asked about the 1970 evaluation of Mr. Doyle, that is the one before the one at which he was recommended for nonrenewal?

A Yes.

Q It is a matter of fact that being on a two-year contract, he was in the middle of that contract at the time of the 1970 evaluations, so that there was no question before the board about renewing or not renewing any contract?

A That's correct.

Q Now, you were also asked about the obscene gesture incident. Was that gesture at any point demonstrated to you by anybody?

A No, not really. I just accepted Mr. Ralph's word that, you know, when I talked to him on the phone that there was an obscene gesture.

Q Well, isn't it a fact that you didn't know what the gesture meant and you had to go home and ask your husband?

A That's true.

Q O. K. Now, from time to time in your capacity

as a member [446] of the board you get calls from your constituents with respect to various matters?

A Yes, I did.

Q Did those calls include comments about teacher dress?

A Yes, there was some on that.

Q Are there any particular instances of people commenting about the dress of a particular teacher?

A Well, yes, there were some on some of the lady teachers. Some of the parents were quite upset when they were wearing the micro minies. Well, they had been told that when they stooped over they could see everything that they had, you know.

Q And was that a matter of concern to you as a person who had to submit bond issues et cetera to the public?

A You better believe it.

Q All right. Now, at the meeting of the committee of a whole in March of 1971 when these evaluations were discussed, at any time did Rex Ralph discuss Mr. Doyle's teacher association activities?

A No.

Q At any time did Mr. Ralph or anyone else say that the mere calling of WSAI justified the nonrenewal of Mr. Doyle's contract?

[447] A No, of course not.

MR. O'CONNELL: No further questions.

CROSS-EXAMINATION

BY MR. BURKHOLDER:

Q Mrs. Clark, there is some discussion in my mind anyway with regard to the order in which Mr. Ralph's recommendation was made.

A Uh-huh.

Q Do I understand that following the general discussion with regard to the pros and cons of Mr. Doyle, was Mr. Ralph at that time asked what his recommendation would be?

A Well, generally speaking. I mean it was after all the evaluations were over, all five days of them. No one came out directly and asked the man, you know, if he was going to recommend. But in a general way we got the idea that he would not recommend. I mean that's basically how it was. I mean he didn't come right out and say, "Yes, I am not going to recommend on such and such." It was generalized.

Q I drew the inference from one of Mr. Sgambati's questions to you that I believe that you concurred in —

A Uh-huh.

Q — that the board of education or the education committee had come to this conclusion and then in effect talked Mr. Ralph into agreeing to make a recommendation formally.

[448] A No.

Q Was that the way it was?

A No. No, that wasn't the way it was, not in making the recommendation. No. It was just generalized. I mean you have to get to the point of it sometime. I mean of whether you are going to hire these teachers or not. You can't bring all 300 teachers into a public meeting.

Somewhere you have to come down and have this more or less generalized who is going to be released and who is going to stay.

Q O. K. So that at some time in this process someone asked Mr. Ralph in effect, "What is your recommendation?" Is that correct?

A Basically, yes, on all the teachers that were going to be released.

Q O. K. And what was his recommendation with regard to Mr. Doyle?

A I think basically it boiled down to that he would not recommend him being rehired.

MR. BURKHOLDER: All right. Thank you.

RECROSS-EXAMINATION

BY MR. SGAMBATI:

Q Mrs. Clark, this cafeteria where the fight broke out —

A You mean the one I referred to?

[449] Q Yes, where you observed Mr. Doyle.

A Yes, uh-huh.

Q Isn't it a fact that he was breaking up a fight at the time?

A I know he was in there. I was talking about after it was over with.

Q After it was over. You don't know what happened inside?

A No, not really. I just seen kids scuffling.

Q Did you tell the other board members about that?

A I could have possibly mentioned it to them. I don't recall.

Q You don't recall?

A No, not really. I don't recall whether I did or not.

Q You don't really recall?

A No, not really.

Q Was that one of the reasons that you decided to nonrenew?

A No. It was everything with regard to his immaturity, his tact; everything that had been discussed at the meeting and everything that has been testified here so far.

Q Everything that's been testified to?

[450] A Yes, right.

• • •

Rex Ralph,

called as a witness by the plaintiff, being first duly sworn, testified as follows:

CROSS-EXAMINATION

BY MR. SGAMBATI:

• • •

[468] Q • • • Directing your attention to an incident which occurred between Mr. Doyle and Mr. Hinkle, when did you become aware of that?

A Upon the call from the principal, Mr. Stragand.

Q And you had at least two meetings with Mr. Doyle on that incident, did you not?

A Yes.

Q And you did suspend Mr. Doyle; is that not right?

A Yes. I think I said "Released from duties for the day."

Q Released for the day or released until the problem could be resolved?

A Until the problem could be resolved.

Q As far as you were concerned, wasn't the problem with the fact that Mr. Doyle would not accept the apology of Mr. Hinkle?

[469] A No.

Q That was not the problem? What was the problem?

A I felt to reach a fair settlement in the total situation. I don't recall it being a forced situation where it was acceptable or not acceptable. I did make notes and I found notes of all this situation, in which I had a conference with Mr. Doyle when he came to my office on the 20th and then with Mr. Hinkle, and then with the two together. I have notes on this. The notes also reported on the

Teacher's Association on their meeting on Monday morning following the suspension.

Q It was certainly your opinion on Monday after meeting with Mr. Hinkle and Mr. Doyle that the problem was not resolved; correct?

A Friday, and also —

Q On Monday?

A And Monday also.

Q It was on Monday that you imposed the suspension; right?

A That's right.

• • •

[472] Q Isn't it also a fact that as a result of the Hinkle incident — I am referring to the Friday on which it occurred — that you were called to a meeting of teachers over in the high school cafeteria?

A I attended a meeting in the high school cafeteria, yes.

Q Do you know what the subject of the meeting was?

A Oh, yes.

Q What was the subject of the meeting?

A You have been referring to it as the Hinkle affair or as the slapping affair, yes.

Q And just for the record, this occurred on the day of the suspension, did it not, not on the day of the incident?

A That's right.

Q I am sorry. I misled you.

[473] What was the reaction? Were you asked questions by teachers?

A Well, I presented to the teachers insofar as I could recall or so far as I could the actual picture as it happened, reporting to them as to the incident that happened as was reported to me by Mr. Hinkle and Mr. Doyle and the

reaction of both individuals and also my action and why this action was taken.

Q Certainly you were asked many questions at that meeting, were you not?

A Yes; questions were asked about incidents which had been brought to my attention.

Q Certainly. Didn't you seem somewhat pressed by the teachers?

A Well, no.

Q Was the atmosphere there cordial as far as you could determine from observing it?

A No. Let's say it was such that they were seeking answers. I don't know that —

Q And you were attempting to provide those answers?

A That's true.

Q And they were not satisfied by your answers, were they?

MR. O'CONNELL: I object.

[474] THE COURT: I don't know where we are going. This speaks for itself, doesn't it?

There were a lot of teachers why by contract were supposed to be in school, teaching school. Here is a principal who is the head of the school, who is supposed to be operating a school. It's a school day. There are a couple of hundred children running around with three or four people supervising them, and everybody else is at a meeting. Now, nobody is going to characterize that as a pleasant situation, are they? It is not pleasant for anybody. What happened?

Incidentally, while we are interrupted, every trade had words of art. Does this Court understand that in this trade —

MR. SGAMBATI: Excuse me, your Honor, trade?

THE COURT: Language. Does "I won't accept an

apology" mean that this matter must be brought to the attention of the board and solved only, will be solved only by board action? Is that what "I won't accept an apology" means?

MR. SGAMBATI: Do you mean from our standpoint, your Honor?

THE COURT: Well, is it a word of art?

MR. SGAMBATI: Not that I am aware of.

• • •

[477] Q Now, in March of 1971 there has been a great deal of testimony about an evaluation session which occurred where board members attended. I take it you attended, certain principals attended; and the subject was, for our purposes, the specific subject, the evaluation of high school teachers. Do you recall attending that session?

A Yes, sir.

Q Did you make any preparations prior to that session with respect to your role or your activities at that session?

A No. Our practice was such that no real preparation was necessary on my part.

Q At what point, Mr. Ralph, or did you — Did you ever make a recommendation on Mr. Doyle's contract other than the formal recommendation which is in evidence?

A Yes. At the end of the valuations or after having reviewed before the education committee — There were the other two members. There were three members of the board on the education committee. With the other two in attendance, I did at this time, when asked what my rec- [478] ommendation would be, I told them that this person I could not recommend after having heard the presentation by the principals and the assistant principals and so forth and that my recommendation quite possibly would be such, which it eventually was.

Q I take it you communicated this to the board after

the evaluation sessions, that is after teachers were recommended?

A Yes, but still during the evaluation or still during when the education committee was still in session, and then these names or these people were presented at the regular board meeting with my recommendation not to reemploy.

Q Basically your recommendation was decided prior to the regular board meeting though?

A For all intents and purposes, yes, as to what my recommendation would be.

Q Did you know about any of the incidents which were discussed during that meeting relative to Mr. Doyle prior to the meeting?

A Yes.

Q Of which incidents were you aware?

A The WSAI incident, the cafeteria incident. There would be two cafeteria incidents, one involving the employee, the other involving the teen-age girls.

Q You were aware of all those?

A Yes, I was.

[479] Q Had you made up your mind prior to the meeting that you would recommend that Mr. Doyle not be renewed?

A No.

Q What else was discussed during the meeting which prompted you to make the recommendation if you were already aware of those instances?

A The presentation by the principals as to their feelings or their evaluations which were made.

Q They presented pros and cons?

A Yes.

Q Mr. Stragand indicated that Mr. Doyle was a fine teacher?

A One of his — Yes.

Q That was certainly — That comment was made to you?

A At least average, let's say. I don't recall exactly, but I do know that there were pros and cons and that was on one of his evaluations, that he was a fine teacher.

Q Had you reviewed his evaluations?

A Written?

Q Yes.

A Yes.

Q When had you done that? They weren't present at that meeting, were they?

[480] A But these are filed, put into the personnel file of the teacher, and I have these available at any time; and the chances are these would have been reviewed after the principals had made their oral reports.

Q At the meeting?

A Not necessarily at the meeting, although I have, to answer questions, I have I know went to the files and pulled certain files of the teachers to answer questions such as tenure or number of years the teacher would have been employed and items that would be included in their personel folder.

Q Did you pull Mr. Doyle's personnel folder?

A I did, but whether it was at the education committee meeting or not I couldn't — but I know I did review it.

Q Well, when you came into the meeting were you aware of the contents of his file? Were you aware that there was a letter of commendation in his file for his teaching?

A Oh, yes. I had sent this letter.

Q And were you aware that there were teacher evaluations in the file that indicated that he was a strong teacher?

A Former years, yes.

Q And were you also aware that there were evaluations indicated [481] that he related well with students?

A Yes.

Q You were aware of all these things when you went into the meeting?

A Yes.

Q Did you relate these things to the board members?

A I am sure they were related to them, either at this time or if they had been in the personnel file at a former evaluation meeting, yes, they had been, yes.

Q And you say you had not made up your mind prior to that meeting?

A As to what was going to happen?

Q (Nodding.)

A No.

Q Whether you were going to renew him or not renew him?

A Right.

Q You were going to await discussion of the principals?

A Right. Yes.

Q But you were certainly aware of all the incidents that were related at that meeting?

A Yes, I was.

Q You weren't aware of their import then?

[482] A Yes.

Q Yes, you were not aware?

A Yes, I was aware in my own mind. And I had assistants for this purpose, a personnel director, assistant principals. I did want to hear the evidence or hear their recommendations before arriving at a final judgment insofar as my recommendation was concerned.

Q Is it your testimony that the principals made a recommendation? You are testifying that Mr. Stragand recommended that Mr. —

A No. I made the recommendation. Mr. Stragand did present an evaluation of Mr. Doyle or —

Q But these included things you already knew about Mr. Doyle?

A Most of them I think, yes.

Q Was there anything that you were not aware of?

A I don't recall of anything, no.

Q Tell me, did you eventually write a letter to Mr. Doyle explaining the reasons for the non-renewal?

A Yes.

Q Handing you what has been marked for identification purposes as Joint Exhibit 7, is that a copy of the letter that you wrote to Mr. Doyle?

A Yes, it is.

Q Now, that letter lists only two reasons for your non-renewal, [483] does it not?

A Are you referring to 1.A. and 1.B.?

Q Yes. Generally there are two incidents described in that communication, are there not?

A Yes. Those are examples of the reasons presented in this statement. "You have shown a notable lack of tact in handling professional matters which leaves much doubt as to your sincerity in establishing good school relationships." A is supporting this, B is supporting this reason.

Q Is there anything in that communication that advises that those are only examples though?

MR. BURKHOLDER: Your Honor —

MR. O'CONNELL: We object. It speaks for itself.

THE COURT: Sustained. It speaks for itself.

Q Did you draft that letter, I take it?

A I did; yes, sir.

Q Was that after consultation with the board or did you do that on your own?

A The board was aware of the items that were going

to be put in the communique; but the reason was, after having discussed with Mr. Barnes and the principals, this was after the evaluation meeting as to how or what reasons, reviewing and going over the reasons.

[434] Q This letter was drafted after the committee meetings and after the formal board action?

A This is right.

Q This is in response to a request from Mr. Doyle?

A That's right, yes.

Q And you indicated only two instances that were given, one being the WSAI incident; correct?

A Yes.

Q Was that in fact one of the reasons, sir?

A Yes.

* * *

[488] **Ralph Shell,**

called as a witness by the defendants, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. BURKHOLDER:

Q Would you state your full name, please?

A Ralph Shell.

Q And your address, Mr. Shell?

A 2636 Ambassador Drive.

Q What is your educational background, please?

A I went to high school at Fairfield High School, got my BS degree at Wilmington College and received my master's degree from Xavier University.

Q Master was in what?

A Education.

Q What is your present position?

A Principal of Mt. Healthy South Junior High.

Q What was your position during the 1969-70 school year?

A Assistant principal at Mt. Healthy High School.

Q And during the 70-71 school year?

A Assistant principal at Mt. Healthy High School.

[489] Q Do you know Fred Doyle?

A Yes.

Q Calling your attention to an incident that happened, it's been testified to, in February of 1970 involving a dispute between Mr. Doyle and Mr. Hinkle, did you have occasion to be aware of that incident at the time it happened?

A Yes.

Q Would you tell us, please, when it first came to your attention and what did you know of it?

A I was in my office before school started and Mr. Doyle came to my office, very upset, and I looked at him and I said, "What's the problem?"

And he said, "Mr. Hinkle just slapped me."

Q Would you describe Mr. Doyle's physical condition at that time?

A Well, he had tears in his eyes. He had his hand up to his cheek and he had his handkerchief out wiping his eyes.

Q Did you note anything particular about the manner of his voice?

A Just that he was upset.

Q O. K. What did you do at that time?

A I asked him to have a seat and I went back to Mr. Stragand's office and told him of the incident.

[490] Q Did you have any further contact with Mr. Doyle —

A No.

Q — as a result of that incident?

A No.

Q Have you had other opportunities to have any direct contact with Mr. Doyle?

A Yes.

Q And can you give us other instances when you have had contact with him?

A Well, one particular instance was during lunchtime and I was in my office and the secretary said that there were three students in the office to see me.

Q Do you know about when this would have been?

A Sometime during the middle of the year.

Q Of what year?

A That would have been 70-71 I believe.

Q And what happened?

A I asked the three students what their purpose was to see me, and they said that Mr. Doyle had kicked them out of the cafeteria. And I said, "Well, let's go down and see what the problem is."

And we walked into the cafeteria. I approached Mr. Doyle. I said, "What's the problem?"

And he turned to me and he says, "Those little son of a bitches."

[491] Q You are sure he said that phrase?

A Yes.

Q Where were the kids when this was said?

A Right behind me.

Q Well, what did you do after he said that?

A Well, after he made the reference to the students, then he continued to explain what the students had done; and I took the students back to the office then.

Q You handled the situation?

A I handled the situation.

Q You originally intended to?

A Yes.

Q Did you do anything by way of reporting this comment to anyone else?

A I reported it to Mr. Stragand and to Mr. Peters.

Q O. K. Did you personally attend the board of education evaluation sessions during the 1970-71 school year?

A No, I did not.

• • •

[492] Q This incident that you testified about, did it occur during the 1970-71 school year?

A Yes.

Q What time of the school year?

A Sometime in the middle of the year.

[493] Q Middle of the year? Can you approximate the month?

A I would say sometime after Christmas vacation.

Q Possibly January?

A Right.

Q And you say four students came to your office?

A Three.

Q Three students came to your office?

A (Nodding.)

Q And wanted to get back into the cafeteria?

A No, not necessarily.

Q Or the snack bar?

A They had been sent there by Mr. Doyle.

Q Oh. They had been sent there by Mr. Doyle?

A Right.

Q They asked you whether they could get back in?

A No. I just asked them what the problem was and they said that Mr. Doyle had kicked them out. And so I said, "Well, let's go down and talk to Mr. Doyle and see what the problem is."

Q And you went down to see Mr. Doyle?

A Yes.

Q Are students kicked out of the snack bar on occasion as a mode of discipline?

A In some cases, yes.

[494] Q That doesn't deny them from the opportunity to eat lunch, does it? You have a school cafeteria though, don't you?

A In certain cases it does, yes.

Q Were there any other instances where students were kicked out of the snack bar that you were aware of?

A I can't recall any particular instances, but I am sure there were.

Q Other than Mr. Doyle? By someone other than Mr. Doyle?

A Well, Mr. Doyle was the supervisor.

Q That snack bar duty, that's a pretty difficult job, isn't it?

A It depends on the person handling the position. It's just like any other position.

Q Have you ever handled it?

A Yes, I have.

Q When?

A About 1965-66.

Q At Mt. Healthy?

A Yes.

Q How many years did you do that?

A One.

Q Mr. Doyle had been doing this for a couple of years, had he not?

[495] A I couldn't say.

Q You weren't at the high school?

A I was at the high school but I was not in administration.

Q So you weren't aware that he was in fact serving for two years?

A I couldn't tell you, no.

Q What did Mr. Doyle say when you approached him? Let's put it this way. What did you say to him when you approached him?

A "What is the problem?"

Q And you approached him in the snack bar?

A Yes.

Q Did you talk to him in the snack bar?

A Yes.

Q Did you feel that was the proper place to talk to him about that kind of problem?

A Yes, I did.

Q Did you say anything else to him except "What's the problem"?

A No.

Q And what did he say?

A He said, "Those little son of a bitches," and proceeded to tell me what the problem was.

Q And what did he tell you the problem was?

[496] A I can't recall.

Q But you can recall the words?

A Yes.

Q Yes. Any reason why you can recall those words but you can't recall anything else about the conversation?

A Well, because normally professional people in a supervisory capacity do not refer to students in that manner.

Q You are saying you have never referred to students as that in a teachers' lounge or anywhere else?

A Not in a supervisory capacity with students around; no, I have not.

Q But you have referred to students?

A I possibly have, yes.

Q What did you do after Mr. Doyle said that?

A I took the students back to the office.

Q Did you believe that there was good reason for them to be ejected from the snack bar? Is that why you took them back to the office?

A Well, I took them back to the office – In my position as being a disciplinarian I always try to back the teacher 100 per cent.

Q And you did back Mr. Doyle?

A I did.

[497] Q And then what did you do with the information that you had obtained from Mr. Doyle?

A I don't recall.

Q Did you report the incident then to someone else?

A I reported the incident of Mr. Doyle referring to the students to Mr. Stragand and to Mr. Peters.

Q Did you make a recommendation or did you just say "Fred Doyle said such and such"?

A Right.

Q And that's all?

A Right.

Q You told this directly to Mr. Stragand?

A Right.

Q Did he say anything in response to your remark?

A I don't recall him saying anything.

Q As far as you know, Mr. Doyle continued in the snack bar as supervisor after that?

A As far as I know, he did, yes.

MR. SGAMBATI: No further questions, your Honor.

MR. O'CONNELL: Just one question, Mr. Shell.

CROSS-EXAMINATION

BY MR. O'CONNELL:

Q You are certain, are you, that the words used by Mr. Doyle [498] were, "Those little sons of bitches"?

A Yes, sir.

Q Not "S. O. B.'s"?

A No.

Q Not "Son of a" and then let the phrase hang?

A No.

• • •

Walter Peters,

called as a witness by the defendants, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. BURKHOLDER:

• • •

[500] Q O. K. During the 69-70 school year, you have heard testimony of an incident when Mr. Doyle was involved with Mr. Hinkle. Are you aware of that incident?

A Yes. My awareness is just to the point that I was informed by [501] Mr. Shell that a slapping incident had occurred and that Mr. Doyle and Mr. Hinkle both were in Mr. Stragand's office, and I needed to get someone to cover his homeroom as far as taking attendance and such.

So that particular day I did get substitutes at that point, at that day, and on that spur of the moment I personally took attendance in the homeroom that day.

Q Well, what time of the day with reference to the start of the school day did this information first come to your attention?

A Let me say, I believe before school started, I believe the incident happened. If it wasn't before school took up in the morning it was — Well, it had to be. It had to be.

Q O. K. Did you see Fred Doyle that morning?

A I saw Fred Doyle through Mr. Stragand's office one time, and that was really all I saw. He was in Mr. Stragand's office at that time.

Q O. K. And later in that day did you have occasion to talk with him?

A Later in the day?

Q (Nodding.)

A No, I did not. If my memory served me right., Mr. Stragand and Mr. Doyle and Mr. Hinkle talked for — I don't know really how long. [502] It seemed like a long period of time. And then, as I say, one of my duties is to call substitutes; and at a point Mr. Stragand came out and said, "Get us a substitute for Mr. Doyle."

Q Do you know whether or not Mr. Doyle completed his teaching duties that day?

A My recollection is that I was told to get a substitute and I had to get a substitute. Now, what I am not sure of is — It would have to be somewhere around 10:30, 10:00 or 10:30.

What I am not sure of, what I did a lot of times and I really can't remember, sometimes you sent students to the cafeteria or a study hall. I don't really remember whether I got a substitute or not.

Q O. K. You don't remember what happened to Mr. Doyle's classes that day then?

A I don't remember.

Q O.K. Calling your attention to approximately November of 1970, did you have occasion to have another contact with Mr. Doyle?

A That's the incident that I as the assistant principal

handled firsthand I believe. Mr. Doyle came to my office somewhere — it had to be around the lunch period, somewhere between — I guess it had to be close to the end of the lunch period because I had to put things straight. I had to get [503] students out of the next period class. When Mr. Doyle indicated to me that he had had a little problem in performing his duties in the snack bar —

Q O. K. Just a second. You were in your office?

A At this point we are in my office.

Q Mr. Doyle comes into your office?

A Mr. Doyle is informing me — Yes. He came to my office and said that he had a little problem and it's something that better be handled because he had made a gesture, a two-fingered gesture to some students; at which time I asked Mr. Doyle, you know, if he did; and he says, "Yes, I did."

One of the students at that point — There were four girls —

Q Wait just a second. I am perhaps getting behind you.

A O. K.

Q Mr. Doyle came into your office?

A By himself.

Q And what did he say? Or, first of all, was he by himself?

A At that point he was by himself.

Q O. K. And what did he say to you, as best you can recall the words?

A He said — I interpreted that he had made a gesture and he was [504] worried about the ramifications of the problems that might occur because of the gesture, and it's something that he needed help to remedy; and that's my job, to help.

Q O. K. At that point just the two of you are talking?

A Yes, sir.

Q O. K. And what did you tell him after he reported this to you?

A First I asked him if he did what he said he did, and he said "Yes."

And then I said, "Do you know where the girls are?"

And one of them was already in the office, outside office.

Q She had followed him up?

A She was there. She was in the outside office. I don't know whether she followed him or whether he brought her. And through the girl – and I don't know if Mr. Doyle knew or if we got the other names from the girl, but we got the names of three more girls, who I had to get out of the fifth period class to bring down to the office to discuss the matter.

I asked Mr. Doyle before we started discussing it if he wanted me to get involved or help, at which point I would have – I don't know [505] what angle or action I would have taken, but I would have tried – some way to get around the gesture bit.

But he said no; he wanted to talk. He wanted to talk it through with the girls themselves, with me in his presence.

So, rounding up the three girls that I had to get out of the class, with the girls that was already in the office, six of us, Fred, myself and the four girls, sat in my office and discussed the matter.

Mr. Doyle handled the discussion almost in total except for the one girl who was a little bit disrespectful and really didn't want to hear any apologies or any explanations or anything.

Q Do you recall what Mr. Doyle said to the girls, particularly with regard to the gesture?

A I can remember right at the beginning because I didn't know how exactly I would have handled it. Mr.

Doyle was explaining everything. He explained everything that led up to the problem, things like they had been causing – these aren't quotes, but things that they had been causing problems and it's his job to see that there is order and the lunchroom isn't messy and this type of thing; and the girls had been causing problems on prior days, which evidently also occurred this particular day.

And then somehow after they had gotten out of the lunchroom, [506] whether they said something or whatever exchange, I was not there. Mr. Doyle made a gesture to the girls and one of the girls – and I suppose, judging from the four that I was talking to, the one that was a little bit disrespectful – made a gesture back at Fred.

Q Did Mr. Doyle say anything to the girls specifically about the gesture? Well, did he apologize?

A Well, yes, he apologized.

Q Do you recall what he said by way of apology?

A Sir?

Q Do you recall what he said to them by way of apology?

A Gee This is something that as far as quotes – I would suppose it would be something like he is sorry if he offended them in any way. Really, I would hate to say exactly what he said. All I know is, when the discussion was finished, overall, the overall tone, I felt that the girls weren't going to carry messages home, hopefully, and cause a big problem with other students in the halls concerning the matter; that in general the discussion went all right and in general they accepted the apology, and that –

Q Was the apology related to the gesture incident or was the apology related to the necessity to bring the girls to the office?

A Well, the apology was to the gesture incident.

[507] Q All right. You mentioned that one of the girls continued to be belligerent and you stepped into it?

A Yes. This is the one girl really didn't want to hear too much of the explanation and, I don't know, you know; it's just an air of disrespect. And I stepped in and I think I just verbally reprimanded her, after which, later that day I did call the girl's mother, kind of avoiding talking about the gesture incident, but that there had been a problem that day, but that there were other problems that had come before me, and that things better be remedied.

Q O. K. Now, calling your attention to what's been described to us as the middle of the 70-71 school year, did you have occasion to have a conversation with Mr. Shell concerning an incident involving Mr. Doyle?

A Mr. Shell informed me, and I have no idea on the date other than it would be somewhere in the middle of the year, that a couple of students had been kicked out of the snack bar part of the cafeteria where Fred worked for disciplinary action, which is not abnormal when students don't behave; they can be suspended, to stay away from a particular area for a day or two.

But evidently these students had gone to Mr. Shell to see if they could be reinstated into the cafeteria and Mr. Shell, in the presence of the students walked the students I suppose back down to the cafeteria [508] area to find out what the problem was and what needed or should be done on Mr. Shell's part or/and eventually possibly remedying the situation, that students be allowed to get back in the snack bar, at which time Mr. Doyle must have referred to the students as "those sons of bitches." I get this from Mr. Shell.

Q Mr. Shell reported this to you?

A Mr. Shell reported this to me.

Q. O. K. What did you do with regard to the information about the four girls and the finger incident? Did you relate that to anyone else?

A Certainly I told Mr. Stragand. We always report the different things, if not at the end of the day, before the beginning of the next day; and I am sure on an incident like this I reported this to him, if not immediately, within the next few minutes, that this had happened.

Q O. K. Were you present at the various sessions of the board of education when they were evaluating teachers at the conclusion of the 70-71 school year?

A Mr. Stragand and I both did all of the evaluations of teachers in the 70-71 — well, in both years; and being in charge of instruction, I had certain departments and Mr. Stragand had certain departments. And so when we go before the board to evaluate teachers we both went before the board and, as the different departments and the kind of teachers would [509] come up, he would handle some, the ones that he had control over, and I would handle the ones that I had control over.

Q O. K. Specifically with regard to the discussion about Fred Doyle, was there any discussion at these board of education evaluation sessions with regard to Mr. Doyle's teacher association activities as being a consideration for his non-reemployment?

A No. I don't remember any. I know he was — Mr. Stragand would have talked specifically about the incidents — about his evaluation in total because the business department was Mr. Stragand's department, so he would have talked mostly about Fred, his teaching abilities and any other pro or con things that would have happened during that year. And I know I had to talk about the gesture incident since I was the one that was involved and I handled that.

Q You did report that incident?

A Mr. Stragand mentioned it and I talked about it.

MR. BURKHOLDER: O. K. I have no other questions.

CROSS-EXAMINATION

BY MR. SGAMBATI:

Q Mr. Peters, directing your attention to the Hinkle incident [510] again, you say you went to Fred Doyle's classroom?

A Only to take the roll for homeroom. Did I go to the classroom?

Q Yes.

A Only to take the roll for homeroom.

Q And this was after you became aware of the incident?

A This was after I knew Mr. Doyle and Mr. Hinkle were in Mr. Stragand's office.

Q Did you take over the homeroom duties then?

A I just took attendance.

Q Did the students wonder where Mr. Doyle was?

A Nothing was said about it.

Q Did you tell them where he was?

A No, I didn't.

Q You say you secured a substitute?

A I saw that Mr. Stragand came out — This was what I have been trying to think. Mr. Stragand came out of the office and told me that Mr. Doyle will be unable to perform his duties, get a substitute.

Now, I looked through my calendar where I keep my subs and who is sub for who, and as far as that booklet from that year, I do not have it. But I was told to get a substitute, and as far as I know, I either got a substitute or — I have been trying to think of this all the last few

days — [511] or I had to send them, which I did quite a bit, send students, when we don't have a substitute, to the cafeteria for study hall. Now, this was halfway through the day anyway and, I don't remember. I tried to think of the substitute that I did secure, and I couldn't.

Q You took roll early in the morning; correct?

A Yes, sir.

Q And you were directed about 10:30 to obtain a substitute?

A They were in the office for an awfully long time, I would say a couple of hours, so it would be somewhere around 10:00 to 11:00 to get a substitute.

Q And you knew while they were in there what the subject or what the reason was?

A Yes, sir.

Q Did you talk to any other teachers about it?

A No, I did not.

Q Anyone inquire about Mr. Doyle's absence?

A No. No, sir. You see, in the morning, every day, all year long, especially around that time, it takes a good — until 9:00 o'clock to get classrooms covered as far as substitutes, and that was my responsibility, and I did not talk to any teachers.

In the afternoon at some point Mr. Stragand filled me in on [512] everything that had transpired during the discussion.

Now, as far as the slapping incident, I knew a teacher was slapped. Today I don't know exactly why the slap occurred, but all I know is that Mr. Doyle was slapped by Mr. Hinkle in his room, with closed doors, and it was reported to Mr. Shell and Mr. Shell reported this to Mr. Stragand, who got the men in the office to talk.

Q Tell me, when in the school year of 1970-71 did the gesture incident occur?

A The gesture incident I had put on a little card. I can only say it's in November. I tried to pinpoint the date later in that year when I wrote the incident up and I couldn't so I didn't date it, but positively it was in November.

Q When did you write the incident up?

A I wrote the incident up — in the spring, the early spring or something. It was after — As far as time element, I am not sure when we meet with — the dates, the dates that we met with the board of education on evaluation. All I know, it was after the date that we met with the board of education on evaluation that I was asked to write this up formally. At that point I only had it on a little card.

Q Are there situations which occur that you do write up in the course of your business, problems with teachers?

A Most definitely. That particular year I had to write up another [513] formally for another teacher.

Q Do you make a practice of writing those things up as they occur?

A Yes — Formally?

Q Yes.

A No. I keep notes, I usually just keep notes; and if they were teachers who are under my jurisdiction as far as evaluation, I would have their folders with me, which I did not and do not have any of the business. At that point I didn't have any business teachers' folders, so it was on a card.

Q And you generally wrote this up at the direction of the board of education?

A Yes, sir.

Q Wrote it up formally?

A Yes, sir. This was sometime in April, I'd say — Well, it was in the spring and it was after we had met with the board.

Q You were at the high school during 69-70 and 70-71 school years; correct?

A Yes, sir.

Q During that time Mr. Doyle was the supervisor at least for one period a day in the snack bar area?

A Yes, sir.

[514] Q During that period of time how many occasions did he — well, on how many occasions did he send students to the office or bring students — I am talking about to your office — that you are aware of?

A Well, I mentioned what my duties were. I really had, and I am sure Mr. Doyle would verify this, very — I only took the discipline problems when Mr. Shell couldn't handle all discipline problems. I worked mainly with supervision of instruction.

Now, I really didn't know that students were suspended from the cafeteria the time of the other incident until afterwards.

Q And all of your testimony on that was information that you obtained from Mr. Shell?

A From Mr. Shell, right.

Q Do teachers make a practice to send discipline problems to the office?

A Definitely.

Q Your teachers that you had jurisdiction over did that?

A No. No. My teachers as far as instruction, which I work with. As far as discipline, I may or may not work with discipline especially 70-71.

Now, if I was in the office and Mr. Shell wasn't in the office and there was a problem, I always handled it. When there were numbers [515] of problems I worked with Mr. Shell. But when everything was under control I was usually doing something with teachers, groups of teachers and so on.

Q But it certainly was, you testified, a common practice for teachers to send discipline problems down to the office?

A Definitely.

Q To remove them from the classroom or wherever the teachers were?

A Well, teachers, as far as the policy of our building, were allowed to temporarily remove students from their classrooms, but they couldn't suspend them indefinitely from their classrooms.

MR. SGAMBATI: No further questions, your Honor.

• • •

[516] **William M. Morris,**

one of the defendants herein, having previously been sworn, testified further as follows:

DIRECT EXAMINATION

BY MR. BURKHOLDER:

Q • • • I want to know whether or not the procedure for evaluating Fred Doyle during the 1970-71 school year was any different than was used for any other teacher that year?

A No.

Q Was it any different than the procedure that had been used in prior years for all teachers?

A No different.

Q Now, during this evaluation process ultimately I assume that someone got around to asking Mr. Ralph for his recommendation?

[517] A Yes.

Q And was this done in connection with his recommendation for Mr. Doyle?

A Yes.

Q And what was his recommendation to the board of education?

A His recommendation at that time was that Mr. Doyle would be included on the list of 10 or non-renewal.

Q O. K. Now, you voted not to renew Mr. Doyle's employment?

A At our regular meeting?

Q Yes, sir.

A Yes.

Q And I understand that in effect the consensus had already been reached —

A Yes.

Q —whether it was at the evaluation session or formally?

A Yes.

Q Would you tell us, please, what factors did you personally consider in arriving at that conclusion?

A Well, I personally thought about the various things that had been presented by the evaluators themselves, and then I weighed in my own mind the questions that other board members had asked in regards [518] his performance and so forth; and then, of course, my own contact with Mr. Doyle, what I had learned about his stability that I considered — his improvement in connection with the things that we had been discussing for several years, you know. I weighed all those things together. So I would say that I used my contact plus the knowledge I gained from the evaluation.

Q Did you give consideration to the superintendent's recommendation?

A Oh, definitely. Definitely.

Q Did you give consideration to whether or not Mr. Doyle was then eligible for a continuing contract?

A That had a very large bearing on it.

• • •

[523] **William Charles Lippmeier,**

one of the defendants, having previously been sworn, testified further as follows:

DIRECT EXAMINATION

BY MR. BURKHOLDER:

Q Mr. Lippmeier, as far as you are concerned, was the procedure used in the evaluation of Fred Doyle any different than that applied to the evaluation and decision with regard to the employment of any teacher?

A It had been the same for quite a few years and it followed all the way through.

Q O. K. You voted not to reemploy Fred Doyle?

A Yes, I did.

Q Would you tell us the factors which you considered in arriving at your decision not to reemploy Mr. Doyle?

A Yes. I think the things I stated before, I felt of the immaturity and the ability not to command the respect of the students as a leader, and also the thing that weighed heavily on my mind was the fact that it was a [524] continuing contract, played an important part in the procedure.

Q Did you give consideration to the recommendation of the superintendent?

A Yes, I did.

Q During the times when Mr. Doyle appeared before the board of education do you consider he conducted himself properly?

A Yes, he did.

Q Did any of his conduct offend you in any way?

A No, it did not.

Q Were there specific instances of heated exchanges between Mr. Doyle and members of the board of education?

A I don't remember any heated instances, no exchanges.

Q And you or other members of the board of education did not actively personally participate in the negotiating sessions; is that right?

A That's right.

Q During the discussions of Mr. Doyle in connection with his evaluation and the question of his employment or non-reemployment, were his teacher association activities discussed or given any consideration in arriving at the decision to employ or not to reemploy him?

A Not at all.

[525] Q Was your decision and vote not to reemploy Mr. Doyle based in any regard or any way upon his teacher association activities?

A None whatsoever.

Q Or to punish him for speaking out either on behalf of the association or personally?

A Not at all.

MR. BURKHOLDER: No other questions.

MR. O'CONNELL: I have no questions, your Honor.

CROSS-EXAMINATION

BY MR. SGAMBATI:

Q Mr. Lippmeier, you are aware of the issue in this lawsuit, are you not?

A Yes, sir.

Q You are aware of the claim of Fred Doyle?

A Yes.

Q You are aware that he is alleging that basically that is the reason, the reason for his non-renewal was an act of punishment for free speech?

A Yes.

Q You say that the same evaluation procedure was

utilized in previous years and as to other teachers as was used for Mr. Doyle?

A Yes, it was.

Q I think you testified earlier that you were certainly aware when [526] you came into that meeting of Mr. Doyle's activities and certainly had some opinion as to his abilities, his maturity; is that right?

A Yes, uh-huh.

Q Now, there were 10 teachers that you non-renewed that year?

A That's correct.

Q Did you have similar opinions as to each and every one of those 10? I realize that there were 300 teachers that you had to consider.

A I would keep notes on teachers that I had concern about all through the year, and I would always have my notes and so forth with me.

Q Well, do you recall as to, let's say, Diana Holmes, Mrs. Holmes, did you have an opinion as to her abilities when you came in?

A Yes, I did.

Q I take it that was a negative opinion?

A Yes, it was.

Q She was quite outspoken, was she not?

A Her outspokedness had not nearly as much to do with it as her conduct and things of this nature.

Q Her conduct with the board of education?

A With the students in the school system, the disruption she [527] caused. I probably had more parental calls about her than any other single teacher that year.

Q And how about Mr. Wayne Brown, did you have an opinion as to him when you walked in that meeting?

A No, I did not.

Q No opinion whatsoever?

A None.

Q How about Mrs. Fast?

A I didn't know Mrs. Fast. I knew very little about her. I had heard a couple of instances earlier in the year on classroom disruption by Mrs. Fast. I believe it was in my notes that there had been some problems with disarray and disorder in her classroom earlier in the year.

Q Do you recall the names of the other teachers who were non-renewed?

A Not at this time, I do not know.

Q Do you know if you had any fixed opinions as to any teacher when you walked in other than Mr. Doyle and Mrs. Holmes?

A Yes, I did. There was one other teacher, I do remember. I believe this was the year. It was Mr. Arne, Verne Arne. I talked to some of his students and parents and students that had been in his class, and it was an extremely poor run class.

And I knew Mr. Arne as a former employee at General Electric. I worked with him at General Electric, and he was laid off [528] there and went into the teaching field after 20 some years of being out of it. And I had a little bit of personal interest in this to see how a man would react in a teaching situation after some 20 years out of it, and the reports I had gotten that he was an extremely poor teacher.

Q Poor classroom teacher?

A Poor classroom teacher.

Q And I take it you didn't receive similar reports on Mr. Doyle?

A No, I didn't.

• • •

JOINT EXHIBIT NO. 1

Mt. Healthy, Ohio
March 22, 1971

The regular meeting of the Board of Education was called to order by President William Lippmeier in the Administration Building at 7:30 PM. Other members present were: Morris, Mueller, Absent: Haupt, Clark.

The minutes of the regular meeting held February 15, were read and approved.

Mr. Morris read a combined report of the Building and Grounds Committee and the Policy Committee. (Copy of these reports are attached.) The Building and Grounds Committee suggests an addition to Regulation #3280 as follows: Propositions giving funds, equipment, or materials to the school with a "matching" agreement or restriction are generally *NOT* acceptable. Acceptance of donated equipment or materials may depend upon the compliance with or experience related to Standardization as outlined in Regulation #3312.1. Whenever the school has an established project; contributions which would reduce the cost or would hasten the completion will be welcome.

Mr. Morris gave the first reading of the Proposed Board of Education Policy No. 9241 —

Employment

No member of the Board of Education or immediate family shall be employed in the Administrative Offices or other areas that would tend to interfere with proper functioning of the Board of Education.

Mr. Mueller, reporting for the Finance Committee, read a report of the Finance Committee meeting held March 9,

1971. (Copy attached and made a part of these minutes.) Mr. Mueller moved the adoption of the attached Annual Appropriation Resolution and that same be submitted to the County Auditor prior to March 31st. The motion was seconded by Mr. Morris and carried on roll call by the following vote:

Yeas: Morris, Mueller, Lippmeier
Noes: None
Absent: Haupt, Clark

In the absence of the Chairman, Mr. Lippmeier reported for the Education Committee. The report states that, after careful evaluation and review of the total teaching staff and due to their performance and lack of contribution to the school system this year, it is recommended that the teachers, as listed below, be notified that the Board of Education will not enter into a new contract with them for the 1971-72 school year.

Mrs. Chancie Hall, Mrs. Bonnie Sears, Mrs. Peggy Wolfe, Mr. Wayne Brown, Mrs. Marian Fass, Mr. Gayle Bates, Mr. Fred Doyle, Mr. Vernon Arne, Mrs. Diane Holmes, Mrs. Norine Miringu.

The Committee recommends that all other members of the professional staff except those needing further consideration be extended the contract for which they are eligible. At the conclusion of the report, Mr. Morris moved to adopt the recommendations of the Committtee. Mr. Mueller seconded the motion which carried on roll call by the following vote:

Yeas: Morris, Mueller, Lippmeier
Noes: None
Absent: Haupt, Clark

Mr. Lippmeier further reported on Education Committee meetings held March 21 and March 16. (Copy attached.)

Mr. Mueller moved the approval of Federal Project for 1971-72 under Title III, N.D.E.A. under which the Board must match the amount of Federal Funds awarded to the School District. The Board's matching funds will amount to $6,950.00. The motion was seconded by Mr. Morris and carried on roll call by the following votes:

Yeas: Morris, Mueller, Lippmeier
Noes: None
Absent: Haupt, Clark

Mr. Morris moved to participate in E.S.E.A. Title II psoject for the 1971-72 school year in the amount of $13,-104.93. The motion was seconded by Mr. Mueller and carried on roll call by the following vote:

Yeas: Morris, Mueller, Lippmeier
Noes: None
Absent: Haupt, Clark

A request was received from teacher Richard Flaig to make an application for a Grant in the amount of approximately $2,400.00 to the Jenning Foundation. Mr. Mueller moved this request be granted. Mr. Morris seconded the motion which was unanimously carried by the Board.

Mr. Mueller, reporting for the School District Planning Commission, read reports of their meetings held Feb. 22 and March 15. (Copies attached.) Mr. Mueller expressed regret at the death of Mrs. John Mosely and moved that Mr. John Mosely be appointed to the Commission to

fill the vacancy. Mr. Morris seconded the motion and was unanimously carried by the Board.

Supt. Ralph submitted a School Calendar for the 1971-72 school year. (Copy attached.) After discussion, Mr. Morris moved to adopt the Calendar as submitted. The motion was seconded by Mr. Mueller and unanimously carried by the Board.

Upon recommendation of Supt. Ralph, Mr. Mueller movedo to employ Mr. Walter Peters as Coordinator of Secondary Education, Grades 7-12, effective Aug. 1, 1971 at the annual salary of $15,000.00. The motion was seconded by Mr. Mueller and carried on roll call by the following vote:

Yeas: Morris, Mueller, Lippmeier
Noes: None
Absent: Haupt, Clark.

Upon recommendation of Supt. Ralph, Mr. Morris moved to employ Mr. James Kuenzli as Assistant High School Principal effective April 12, 1971 at the annual salary of $13,200.00. Mr. Mueller seconded the motion which carried on roll call by the following vote:

Yeas: Morris, Mueller, Lippmeier
Noes: None
Absent: Haupt, Clark

Supt. Ralph read letters of resignation from Lunchroom Worker Kathe Fesevur, School Bus Driver Diane Wagers, Custodian Charles Distler, who retired, and teacher Betty S. Gellman. Mr. Mueller moved these resignations be accepted. Mr. Morris seconded the motion which was unanimously carried by the Board.

Upon recommendation of Supt. Ralph, Mr. Morris moved to employ as a Lunchroom worker Mrs. Betty Wayehoff of 9614 Dunraven Drive, Cinti 39, Ohio for two hours per day and the annual full-time salary of $2,-432.00 effective Nov. 26, 1970. ($1.60 per hour.) Mr. Mueller seconded the motion which carried on roll call by the following vote:

Yeas: Morris, Mueller, Lippmeier
Noes: None
Absent: Haupt, Clark

Upon recommendation of Supt. Ralph, Mr. Mueller moved to employ as a four-hour per day Lunchroom Worker Mrs. Vera Burbrink of 2636 Wenning Road, Cinti. 31, Ohio at the annual full time salary of $2,432.00 effective March 1, 1971. Mr. Morris seconded the motion which carried on roll call by the following vote:

Yeas: Morris, Mueller, Lippmeier
Noes: None
Absent: Haupt, Clark

Upon the recommendation of Supt. Ralph, Mr. Morris moved to employ as a teacher Mrs. Sandra J. Freisheim of 4048 Paddock Road, Cinti. 29, effective March 1, 1971 at the annual salary of $10,050.00. Mrs. Freisheim has a B degree and 9 years experience. Mr. Mueller seconded the motion which carried on roll call by the following vote:

Yeas: Morris, Mueller, Lippmeier
Noes: None
Absent: Haupt, Clark

Upon the recommendation of Supt. Ralph, Mr. Mueller

moved to employ as a teacher Mrs. Elizabeth Grove of 1702 Berkley St., Cinti., Ohio 45237, at the annual salary of $6,700.00 effective March 1, 1971. Mrs. Grove has a B degree and no experience. Mr. Morris seconded the motion which carried on roll call by the following vote:

Yeas: Morris, Mueller, Lippmeier
Noes: None
Absent: Haupt, Clark

Upon the recommendation of Supt. Ralph, Mr. Morris moved to employ as a teacher Mrs. Michele Parent of 596 Lowell Ave., Cinti. 20, Ohio at the annual salary of $6,-700.00 effective February 22, 1971. Mrs. Parent has a B degree and no experience. Mr. Mueller seconded the motion which carried on roll call by the following vote:

Yeas: Morris, Mueller, Lippmeier
Noes: None
Absent: Haupt, Clark

No further business appearing, the meeting was adjourned.

/s/ JACK J. CHADWICK
Clerk

/s/ W. C. LIPPMEIER
President

JOINT EXHIBIT NO. 2

CONFIDENTIAL

BOARD OF EDUCATION
MT. HEALTHY PUBLIC SCHOOLS
REPORT OF EDUCATION COMMITTEE

March 17, 1971

EVALUATION OF TEACHERS FOR THE 1970-71 SCHOOL YEAR

I. After careful evaluation and review of the total teaching staff and due to their performance and lack of contribution to the school system this year, it is recommended that the following teachers be notified that the Board of Education will not enter into a new contract with them for the 1971-72 school year:

Frost Elementary

Mrs. Chancie Hall
Mrs. Bonnie Sears
Mrs. Peggy Wolfe

Hoop-Hunt Elementary

Mr. Wayne Brown
Mrs. Marian Fass

High School

Mr. Gayle Bates
Mr. Fred Doyle
Mr. Vernon Arne
Mrs. Diane Holmes
Mrs. Norine Miringu

II. The committee recommends that all members of the professional staff other than those needing further consideration be extended the contract for which they are now eligible.

EDUCATION COMMITTEE

William M. Morris
Charles Mueller
D. B. Keye
Bert W. Barnes
Rex Ralph
Marcia Haupt
Vivian V. Clark
William C. Lippmeier

JOINT EXHIBIT NO. 3

February [illegible], 1971

	Name (With Schools)	Date Employed	Contract Number Years	Total Experience	Number Years in Mt. Healthy	Contract Expires	Grade or Subject	Degree	Contract Eligible	Certification	Evaluation: November	Evaluation: January (Feb.)	Evaluation: March	Evaluation: Average	Evaluation: Supervisor	1971-72 Contract	Physical Due	Certificate Expires
1.	Mr. James Adams	1-31-66	1	5 2/3	5 2/3	1971	English	B.	1	4 yr. H. S.	8.7	8.9		8.8			1972	1973
2.	Miss Jeanne Antista	8-28-69	1	2	2	1971	Vocal Music	B.	1	4 yr. Spec.	8.8	8.8		8.8		Also at North	1972	1973
3.	Mr. Vernon Arne replaced Henry Heiet	9-30-70	1-	1-	1-	1971	Mathematics	IV Bo	1	1 yr. H. S.	8.4	8.0		8.2			1973	1971
4.	Mrs. Corinne Baisden	9-1-44	C	41	25	-	Business	III Bo	-	8 yr. H. S.	7.2	7.5		7.35			1971	1976
5.	Mrs. Wanda Bennach replaced by Mr. Shepard	8-28-69	1	2	2	1971	Social Studies	B.	1	4 yr. H. S.						Resigned eff. 1-22-71	1972	1973
6.	Mr. Gayle Bates	8-27-70	1	19	2 mil 1	1971	Distributive Ed	VI Bo	1	4 yr. H. S. 1 yr.	6.7	6.7		6.7			1973	1974 1972
7.	Mr. James Bayliss	9-1-66	1	8	2 mil 7	1971	Social Studies	B.	1	4 yr. H. S.	8.0	8.0		8.0			1973	1971
8.	Mr. Lorenzo Boucher	8-27-70	1	8	1	1971	Mathematics	IV Bo	1	4 yr. H. S.	7.9	8.2		8.05			1973	1974
9.	Mr. Robert Berta	8-28-69	1	2	2	1971	Social Studies	B.	1	4 yr. H. S.	7.5	7.5		7.5			1971	1973
10.	Miss Gloria Bitsoff	8-28-70	1	6	1 (C)	197[illegible]	Counselor	M.	1	4 yr. P. P.	7.0	6.9		6.95			1973	
11.	Mr. Robert Brossart	9-1-67	1	4	4	1971	Special Ed.	B.	1	4 yr. Spec.-Ed.	7.4	7.4		7.4			1973	1971
12.	Mr. Richard Bullock	8-27-70	1	7	4 mil 1	1971	Mathematics	B.	1	4 yr. H. S.	7.9	8.0		7.95			1973	
13.	Miss Alexandria Bush	8-27-70	1	1	1	1971	Mathematics	B.	1	4 yr. H. S.	7.2	7.5		7.-			1973	1974

February 2[illegible], 1971

HIGH SCHOOL

		Date Employed	Contract Number Years	Total Experience	Number Years in Mt. Healthy	Contract Expires	Grade & Subject	Degree	Contract Eligible	Certification	EVALUATION: Principal	EVALUATION: Assistant (Pub.)	EVALUATION: Coach	EVALUATION: Average	EVALUATION: Supervisor	1971-72 Contract	Physical Exam	Certificate Expires
19.	Mrs. Connie Campbell	8-27-70	1	3½	1	1971	Business	B.	1	4 yr. H. S.	8.2	8.2		8.2			1973	1973
15.	Mr. E[illegible]berlin	8-6-68	1	5	5	1971	Physical Ed.	B.	1	5 yr. Spec. 4 yr. H. S.	8.7	83.		8.5			1972	1974 1974
[illegible]	Mr. Clare Chaney	8-8-67	1	13	4	1971	Physical Ed.	B+ IV	1	4 yr. H. S.	9.0	8.7		8.85			1973	
17.	Mr. A[illegible]lyns	8-1-69	1	10	8	1971	Industrial Arts	B.	1	4 yr. H. S.	7.9	8.0		7.95			1972	1971
18.	Mr. B. J Cook	8-1-61	C	21	20	-	Science	M.	-	Perm. H. S.	7.3	7.3		7.3			1971	-
16.	Mr. Robert H. Cooper	8-1-68	1 C 3 (T)	(2 C) 9½	9½	1971	Counselor	M.	C (T	4 yr. P. P. 6 yr. H. P. 6 yr. H. S.	8.8	8.8		8.8			1971	1973 1973 1976
20.	Mrs. Marjorie Davis	8-1-68	1	8	3	1971	Spanish	IV M	2	8 yr. H. S.						Also at North	1971	1976
21.	Mr. Fran[illegible] Doyle	8-6-68	2	5	3 mil 5	1971	Business	M.	C	6 yr. H. S. 4 yr. P. P.	7.7	7.5		7.6			1972	1977 1972
22.	Miss Ter[illegible] Labine	8-5-67	1	9	9	1971	English	B.	1	4 yr. H. S.	8.0	8.1		8.05			1973	1971
23.	Mrs. Mar[illegible]ary Fallance	Ret. 8-1-68	1	9	1/7	1971-	Physical Ed.	M.	2	8 yr. Spec. 4 yr. P. P. (T.T.)	8.8	8.7		8.75			1973	1978 1974
[illegible]	Mr. Richard Fleig	8-6-68	1	5	5	1971	German	B.	1	4 yr. H. S.	10.7	10.6		10.65			1972	1973
25.	Miss Ruth Fredricks	8-1-41	C	32	30	-	Mathematics	VI M	-	Perm. H. S.	8.7	8.8		8.75			1971	-
26.	Mr. William Fridman	8-1-[illegible]	1	8	2	1971	Physical Ed.	B.	1	4 yr. H. S.	8.7	8.5		8.6			1971	

February 2[illegible], 1971

HIGH SCHOOL	Date Employed	Contract Number Years	Total Experience	Number Years in Mt. Healthy	Contract Expires	Grade or Subject	Degree	Contract Eligible	Certification	EVALUATION: November	EVALUATION: January (Prel.)	EVALUATION: March	EVALUATION: Average	EVALUATION: Supers.	1971-72 Contract	Typical Pay	Certificate Expires
(6-19-67 SS)																	
Mr. Robert Garwood	9-5-67	1	7	4	1971	Social Studies	B.	1	4 yr. H. S.	7.9	7.8		7.9			1973	1973
Mrs. Betty Gellman	8-27-70	1	1	1	1971	Special Ed.	IV B+	1	1 yr. Spec.-Exc.	6.3	6.5		6.4			1973	1973
Mrs. Judith Gilhart	8-1-68	1	6	6	1971	Home Economics	B.	1	4 yr. Voc.	8.7	8.8		8.75			1971	1973
Mr. Walter Herrop	9-1-68	C	10	6	-	Science	M.	-	8 yr. M. S.	10.1	10.3		10.2			1971	1974
Miss Joyce Herville	8-29-68	1	3	3	1971	Social Studies	IV B+	1	4 yr. M. S.	7.1	7.1		7.1			1971	1972
Mr. Owen Hauck (SS)	8-17-69	1	17	3	1971	Social Studies	M.	1	4 yr. M. S.	8.2	8.2		8.2			1971	1972
Mrs. Betty Hawkins	10-17-67	1	4-	4-	1971	Business (C. O. E.)	B.	1	4 yr. M. S.	8.0	8.0		8.0			1973	1971
Mr. Bruce Hemm	9-1-68	1	3	3	1971	Mathematics	B.	1	4 yr. M. S.	8.7	8.5		8.6			1971	1972
Mr. Russell Hinkle	7-8-68	1	14	2 mil 11	1971	Dept. head Instrum. Music	IV B+	1	4 yr. Spec.						Also at Darrell	1972	1973
Mr. Darryll Hinson	9-69 to 2-88 8-29-69	C	8	7½	-	Science	M.	-	8 yr. M. S.	7.2	8.8		9.0			1972	1978
Miss Helen Hirsch	1-2-68	1	3½	3½	1971	Physical Ed.	B.	1	4 yr. Spec.	7.1	7.2		7.15			1973	1971
Mrs. Betsy Hobbs	8-28-68	1	2	2	1971	English	B.	1	4 yr. M. S.	7.7	7.6		7.65			1972	1974
Mrs. Jic[illegible] Holmes	9-5-67	1	4	4	1974	English	B.	1	4 yr. M. S.	8.4	8.0		8.2				1971

February 2.., 1971
High Sch[illegible]

	Date Employed	Contract Number Years	Total Experience	Number Years in Mt. Healthy	Contract Expires	Grade or Subject	Degree		Contract Eligible	Certification	EVALUATION November	EVALUATION January (Feb.)	EVALUATION March	EVALUATION Average	EVALUATION Supers.	1971-72 Contract	Physical Due	Certificate Expires
Mr. Raymon Hughes	8-28-69	1	2	2	1971	Industrial Arts	IV B.		1	4 yr. B. S.	9.7	9.5		9.6			1972	1973
Mr. Jeffr y Juett	9-1-68	3	6	3 mil 6	1971	Industrial Arts	B.		1	4 yr. B. S.	9.4	9.4		9.4			1971	1973
Mr. Steph n Kionne	8-28-69	1	2	2	1971	Business	III B+		1	4 yr. B. S.	7.0	7.0		7.0			1972	1973
Mr. Donal Kuhlmann	9-1-58	1	18	2 mil 16	1971	Social Studies	B.		1	4 yr. B. S.	7.4	7.1		7.25			1971	1973
9-60 to	1-27-61						III											
Mrs. Rebecca Kull	9-1-61	1	12½	10½	1971	Art	B+		2	4 yr. Spec.	8.8	8.9		8.85			1971	1972
Mrs. Mary Kuyper	9-20-60	C	8 Pr 10	11	-	Special Ed.	IV B+		-	B yr. Elem.	9.0	9.0		9.0			1971	1971
Mr. George Lammert	8-27-70	1	10	2 mil 1	1971	Auto-Mechanics	B		1	1 yr. B. S.	8.0	8.0		8.0			1973	1971
Mr. Corey Lock	9-1-65	2	6	6	1971	English	B.		C	3 yr. B. S. 4 yr. Supv.	9.9	8.9		9.4			1971	1977 1974
Miss Jean e Maddox	8-28-69	1	2	2	1971	Art	B.		1	4 yr. Spec.	7.9	7.9		7.9			1972	1973
Mrs. Frances A. Martin	9-1-66	1	3	3	1971	Home Economics	III B+		1	4 yr. Voc.	7.5	7.6		7.55			1971	1973
Mr. Henry Malet employed by Mr. Arms	9-10-69	1-	1+	1+	1971	Mathematics	IV B+		1								1972	
Mrs. Jennifer Mathis	9-5-67	1	4	4	1971	Mathematics	B.		1	4 yr. B. S.	8.4	8.4		8.4			1973	1971
R. Davi[illegible] Merkel	9-5-67	1	4	4	1971	Business	B.		1	4 yr. B. S.	7.5	7.3		7.4			1974	1971

February 25, 1971

HIGH SCHOOL

		Date Employed	Contract Number Years	Total Experience	Number Years in Mt. Healthy	Contract Expires	Grade or Subject	Degree	Contract Eligible	Certification	EVALUATION					1971-72 Contract	Physical Exam	Certificate Expires
											Principal	January (Feb.)	Asst.	Average	Supervisor			
2.	Mrs. Frances Hickey	8-27-70	1	1	1	1971	French	B.	1	4 yr. H. S.	7.5	7.5		7.5			1972	1972
34.	Miss Bette K. Miller Smeltzer	Sept. 68	C	29	28	-	Librarian	M	-	Perm. H. S.						Trans. to H. S. 1-25-71	1971	-
35.	Mrs. Carol Miller	8-6-68	3 T	7	(4 C) 3	1971	Counselor	M.	C T	6 yr. P. S. 4 yr. Span. 4 yr. H. S.	10.1	10.1		10.1			1972	1973 1973 1972
36.	Mrs. L. Kerline Mirings	8-27-70	1	1	1	1971	English	B.	1	4 yr. H. S.	9.6	9.1		9.36			1972	1976
37.	Mrs. Harriet Nevin	9-1-67	1	17	14	1971	English	B+ III	1	4 yr. H. S.	8.7	8.8		8.8			1971	1973
38.	Mrs. Gloria Patrick	9-1-66	1	9	9	1971	English	B.	1	4 yr. H. S.	8.8	9.4		9.46			1971	1972
39.	Mrs. Sidney Peters	8-28-69	1	2	2	1971	Business	B.	1	4 yr. H. S.	8.2	8.2		8.2			1972	1978
40.	Mr. Kenneth Peters	8-28-69	1	2	2	1971	Science	B+ IV	1	4 yr. H. S.	8.2	8.2		8.2			1972	1972
41.	Mrs. Catherine Pollock	9-11-67	1	4-	4-	1971	Home Economics	B	1	4 yr. H. S. 4 yr. Voc.	8.4	8.2		8.2			1972	1971 1971
42.	Mrs. Diana Redwine	9-1-66	1	7	7	1971	French	B.	1	4 yr. H. S.	8.8	8.8		8.8			1973	1972
43.	Mrs. Anne Richburg	8-27-70	1	2	1	1971	Science	B.	1	1 yr. H. S.	7.4	7.4		7.4			1973	1971
44.	Mrs. Carol Riddell	9-5-67	1	6	4	1971	English	B.	1	4 yr. H. S.	10.0	9.9		9.96			1973	1971
45.	Mrs. Ruby Roach	9-1-67	C	36	24	-	Social Studies	B+ VI	-	Perm. H. S.	8.8	8.5		8.64			1971	-

February 25, 1971

	HIGH SCHOOL	Date Employed	Contract Number Years	Total Experience	Number Years in Mt. Healthy	Contract Expires	Grade or Subject	Degree	Contract Eligible	Certificate	EVALUATION November	EVALUATION January (Feb.)	EVALUATION March	EVALUATION Average	EVALUATION Supervisor	1971-72 Contract	Physical Due	Certificate Expires
6.	Mrs. Sandra Ruby	9-5-67	1	5½	4	1971	English, Latin	B.	1	4 yr. H. S.	9.3	9.3		9.3			1973	1971
7.	Mr. Michael Rose	8-27-70	1	1	1	1971	English	B.	1	4 yr. H. S.	7.0	8.1		8.55			1973	1974
8.	Mr. Jan Shade	10-17-67	1	1½	4	1971	Business	B+ II	1	4 yr. H. S.	8.9	8.9		8.9			1973	1973
9.	Mr. Donald Shelton	8-28-69	1	2	2	1971	Math., Science	B.	1	4 yr. H. S.	7.8	7.8		7.8			1972	1973
9.	Mr. Robert Shepard for Mrs. Bannach	1-25-71	½ yr.	½	2 mil ½	1971	Social Studies	B.	1	4 yr. H. S.							1973	1973
10.	Mr. N. Thomas Smith	9-5-67 Ret. 1-27-71	to 6-7-71 1	6½	3 mil 3½	1971	English	M.	1.	4 yr. H. S.	8.8	8.8		8.8			1973	1971
2.	Mrs. Loretta Stackhouse replaced by Mrs. Spahr	8-27-70	1	3+	7 days	1971	English	B.								sub. res. 9-21-70		
11.	Mrs. Betty Staley	8-27-70	1	1	1	1971	Business (I. O. E.)	B.	1	4 yr. H. S.							1973	1972
	Mrs. Suzanne Suprock	8-27-70	1	3 Pr 4	3	1971	Social Studies	B+ IV	1	4 yr. H. S.	7.5	7.5		7.5			1973	1971
12.	Mr. James Sutton	8-26-69	1	4	2	1971	Science	B.	1	4 yr. H. S.	6.9	7.0		6.95			1972	1972
	Mrs. Jacquelyn Tabony	9-1-68		4	3	1971	Business	B.	1	4 yr. H. S.						Resigned eff. 2-4-71	1971	1972
13.	Mr. Gregory Tedesco	1-29-70	1	1½	1½	1971	Science	B.	1	4 yr. H. S.	7.7	7.7		7.7			1973	1973
	Mrs. Helen Tedrick	12-15-69	1½	1½	1½	1971	Physical Ed.	B.	1	4 yr. Spec.	8.8	8.8		8.15			1972	1971

February 25, 1971

HIGH SCHOOL	Date Employed	Contract Number Yearn	Total Experience	Number Years in Mt. Healthy	Contract Expires	Grade or Subject	Degree	Contract Eligible	Certification	EVALUATION November	January (Feb.)	March	Average	Supervisor	1971-72 Contract	Physical Due	Certificate Expires
Mrs. Ruth Spahr	9-25-70	1-	4-	1-	1971	English	III B+	1	4 yr. H. S.	7.9	7.9		7.9			1973	1974
Succeed-Mrs. Stackhouse																	
Mr. Neil C. Thinnes	9-1-64	Sup. C T	15	3	1971 -	Department Head Athletic Dir.	M.	1	- yr. H. P. 4 yrs. H. S.							1971	1972 -
Mr. Jack Thomson	9-1-55	C T	16	12	-	Counselor	M.	-	5 yrs. H. S. 5 yr P. P.	6.6	6.8		6.7			1971	1972
Mrs. Betty Whitcomb	8-27-70	1	4½	1	1971	English	M.	1	4 yr. H. S.	7.6	7.6		7.6			1973	1974
Mrs. Nancy Whittaker	8-27-70	1	2½	1	1971	Spanish	B.	1	4 yr. H. S.	8.3	8.3		8.3			1973	1972
Mrs. Helen White	Sept. '52	C	24	19	-	Librarian	IV B+	-	Perm. Spec.	10.4						1971	-
Mr. Thomas Wick	10-27-69	1	2-	1-	1971	Mathematics	B.	1	2 yr. H. S.	7.8	7.8		7.8			1972	1971
Mr. Gerald Wirthwine	8-28-69	1	2	2	1971	Business	B.	1	4 yr. H. S.	8.0	7.8		7.9			1972	1973
Mrs. Alaine Zibes	9-1-68	1	3	3	1971	German	IV B+	1	4 yr. H. S.	9.3	9.4		9.35			1971	1971

JOINT EXHIBIT NO. 4

April 2, 1971

Mr. Frederick W. Doyle
1965 Connecticut Avenue
Cincinnati, Ohio 45224

Dear Mr. Doyle:

This is to officially notify you that the Mt. Healthy Board of Education will not extend to you a contract for teaching in the 1971-72 school year. This decision was made at the regular meeting held March 22, 1971.

May we extend to you our best wishes.

Sincerely,

Jack J. Chadwick
Clerk-Treasurer

[CERTIFIED MAIL RECEIPT OMITTED]

JOINT EXHIBIT NO. 5

MT. HEALTHY CITY SCHOOL DISTRICT
Mt. Healthy
Cincinnati, Ohio 45231

July 19, 1974

TEACHER'S SALARY SCHEDULE for *FRED DOYLE* for years listed below taken from the official payroll records of the Mt. Healthy City Schools in the Clerk-Treasurer's Office

September 1970	$9,324.00	M-8
Raise January 1, 1971	9,916.00	M-8
Extra Duty — Assistant High School Newspaper Advisor Step 3 — 22 value x 8 points = $176.00		
September 1971	10,251.00	M-9
Raise January 1, 1972	10,748.00	M-9
September 1972	11,297.00	M-10
Raise January 1, 1973	11,613.00	M-10
September 1973	11,890.50	M-11
Raise January 2, 1974	12,692.00	M-11
September 1974	13,148.00	M-11

/s/ E. A. WHEATON

E. A. Wheaton
Superintendent

EAW:RWS

JOINT EXHIBIT NO. 7

April 15, 1971

Mr. Fred Doyle
1965 Connecticut Avenue
Cincinnati, Ohio 45224

Dear Mr. Doyle:

Continuing contracts normally are awarded to those staff members who have not only displayed professional teaching ability, but who also have shown through their words and actions that they truly support the philosophy and goals of the Mt. Healthy School System. The following reasons were submitted to the Board prior to the consideration for the continuing contract:

I. You have shown a notable lack of tact in handling professional matters which leaves much doubt as to your sincerity in establishing good school relationships.

A. You assumed the responsibility to notify W. S. A. I. Radio Station in regards to the suggestion of the Board of Education that teachers establish an appropriate dress code for professional people. This raised much concern not only within this community, but also in neighboring communities.

B. You used obscene gestures to correct students in a situation in the cafeteria causing considerable concern among those students present.

Sincerely yours,

Rex Ralph
Superintendent

RR:RWS

JOINT EXHIBIT NO. 8

MIAMI TRACE LOCAL SCHOOL DISTRICT
414 E. Court Street :: Box 624
Washington Court House, Ohio 43160

June 21, 1974

TO WHOM IT MAY CONCERN:

In a reply to a request from Mr. Frederick Doyle, the following information is made available from the records of the Clerk of the Miami Trace Local School District:

District	1971-72	1972-73	1973-74
(a) Salary for regular year as a counselor	$8,419.84	$9,772.80	$10,395
(b) Wages from extended service as a counselor	467.76	814.40	866.25
(c) Wages for instruction in Adult Basic Program	973.75	990.00	1,133.33
(d) Amount Mr. Doyle paid into Blue Cross-Blue Shield Insurance Coverage	190.13	279.65	268.52

Sincerely,

/s/ GUY M. FOSTER

Guy M. Foster
Superintendent

PLAINTIFF'S EXHIBIT NO. 15

June 11, 1969

Mr. Frederick Doyle
3884 Michael Drive
Cincinnati, Ohio 45230

Dear Mr. Doyle

You have been selected by the Board of Education to receive its award of commendation for your excellent rating as a teacher and service to the Mt. Healthy Schools during the 1968-69 school year.

The Board of Education is happy to have you as a member of its staff and takes pleasure in notifying you that you will receive an additional increment on the salary schedule for the 1969-70 school year.

We wish you continued success in your teaching in the Mt. Healthy Schools and hope that your future years will be gratifying and rewarding to you.

Sincerely yours,

Rex Ralph
Superintendent

RR:RWS

DEFENDANT'S EXHIBIT NO. 1

[handwritten] (Ralph's) Pltf's Ex. 1-3/15/72

February 20, 1970

To Mr. Ralph
From L. McMullen

Resume of Incidents with Mr. Doyle

Doyle come into the kitchen for a second portion of spaghetti and sauce, declaring that his first portion was not large enough. He said that he didn't need to pay for this amount of food since we had it left from a spaghetti supper the night before (he *didn't* pay).

He was informed that we had purchased the food from the people who had prepared the supper, in effect, we did not charge them (in their bill) for the amount of food they did not use; only charged them for the amount they did use, as they had overordered. This was told to him.

He also declared that our employees either take food home every day or we throw it away.

Then he returned a second time on the same day. He told Mrs. Preston that furthermore — he kept her "stupid" table clean in the snack bar and wasn't paid for it. Did it for *Free*. Lillian asked him what he called the table, and he said "stupid, just like you are." This is what really angered her, and she ordered him out saying that he had made his point and could get out of the kitchen.

Follow Up: (1) I reported the incident to both you and Mr. Hartzler.

(2) Lillian and I went to Mr. Stragand's office and told him this whole story. He told us that he needed to talk to Mr. Doyle.

This is where and how everything was left.

/s/ LUCILE W. McMULLEN

DEFENDANT'S EXHIBIT NO. 2

TEACHER MEMO: FEBRUARY 8, 1971

Re: Teacher dress and appearance

Appropriate dress for professional educators is very difficult to define, but as teachers and professional educators we need to maintain a rapport of dignity and respect with the students we teach. We must be concerned about protecting the dignity of the profession of which we are members.

At a time when we are attempting to establish good public relations between the professional teacher of Mt. Healthy and the general public, it behooves us to be conservative in dress and grooming, so as not to become involved in, what one might consider, the backlash that has developed toward the radical and liberal elements of our society.

The people of Mt. Healthy are most understanding about most things, but for the most part, conservative and are not quick to adapt to changes in their expectations and ideas.

We know from time and experience that Mt. Healthy is continually struggling to meet the operational obligations of supporting a quality educational program. In the future we know that this is going to become a more difficult task to achieve.

All of us have been attempting to secure the funds necessary to operate the schools the way we know they should be operated. Included in these needs are salaries, equipment and materials that are so badly needed and so important to the operation.

Up until now our tax payer has been willing to support these needs, but you can see as well as I, that this support has been increasingly more difficult to attain.

In November of 1968 there was an inquiry made to the Mt. Healthy Education Association to formulate a teacher dress code. The answer at that time was, "that the question of dress be resolved between the teacher and his/her principal and that teachers as a whole do not need a dress code." I do not disagree with this statement.

I believe that there is and will be appropriate dress for appropriate occasions. It seems odd, that when we talk about salaries, materials and working conditions, we compare ourselves to other professional groups such as engineers, doctors and lawyers, but, when we talk about appropriate dress we talk about secretaries and nurses to use an example.

Based on the fact that we are continually trying to improve our profession from the statements previously mentioned, we deem it necessary to make some statement as to what is expected of the professional teachers in Mt. Healthy.

TEACHER MEMO:

page 2.

We will be conservative in our dress, we must be concerned about any distracting clothing that might be worn. The length of the dress or skirt should be such as to not bring undue attention or comments to you as a teacher.

The pant suit or slack idea seems quite appropriate in certain situations, but does not seem appropriate in front of the classroom on a professional educator. Therefore pant suits will be considered inappropriate.

As male teachers we should be concerned about the length and neatness of our hair and the trimness of our mustaches. I don't believe it is asking too much for male

teachers to wear neck ties and a dress shirt during their instructional duties.

In general the appearance of our teaching staff has been such that we have been justifiably proud. I am seeking your cooperation on the previous comments that have been made regarding that which is expected. These decisions were made on a school-wide basis in hopes that it will help the image of the professional staff and Mt. Healthy City School district in general.

/s/ JAMES STRAGAND

DEFENDANT'S EXHIBIT NO. 4

MT. HEALTHY CITY SCHOOL DISTRICT
Mt. Healthy
Cincinnati 31, Ohio

February 24, 1970

MEMORANDUM TO MT. HEALTHY TEACHERS' ASSOCIATION:

Upon further investigation and consultation with the parties involved, I have recommended to the Board of Education that Mr. Doyle's request to withdraw his request for hearing upon his release of duty, be granted and that all charges of conduct unbecoming a teacher against him be dismissed.

Rex Ralph
Superintendent

DEFENDANT'S EXHIBIT NO. 5

Earlier in the year Mr. Doyle and four girl students had a little problem over the procedure that Mr. Doyle follows in supervising the cafeteria during lunch time.

Because of the fact that the snack bar is needed fifth period for a study hall, Mr. Doyle tries to start getting things cleared up around 12:15. The girls felt this was unfair, and they began to make an obvious effort to slow things up as much as possible. After a couple days of this, Mr. Doyle confronted them on the situation and a heated verbal dispute ensued. During or at the end of the argument, Mr. Doyle gave the girls the two-fingered gesture and, of course, the girls responded with their own gesture.

Mr. Doyle came to me and told me of the problem and the names of the four girls involved. He told me that he knew he had overreacted and all he wanted to do was talk to the girls in order to get things straightened out.

I called the girls to the office and Mr. Doyle did most of the talking. I only got involved when one girl began acting very rude and started getting disrespectful. During the course of the conversation, Mr. Doyle apologized for his actions and conveyed the reasons for the procedure following in supervising the cafeteria.

Certainly, this type of action, provoked or unprovoked, is not the type of action that should be forthcoming from a mature adult.

/s/ WALTER PETERS
Walter Peters
Assistant Principal

DEFENDANT'S EXHIBIT NO. 6

As a result of a teacher memo on February 8, 1971 regarding teacher dress and appearance, there were comments made on W. S. A. I. In checking where this information came from and how this ended up being commented about on a local radio station, I found that Mr. Doyle had made a phone call to one of the disc jockies that he knows.

I talked with Mr. Doyle about calling the radio station; he admitted to doing this and that he didn't think before acting. He apologized to me for his actions. I asked why he had done this when he didn't come in and talk to me about the situation — yet he decided to put it on the news media. I expressed my concern for community reaction or misinformation. He understood and agreed with me.

/s/ JAMES T. STRAGAND

James T. Stragand
Principal

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

No. 75-1278

FRED DOYLE,
Respondent,

vs.

MT. HEALTHY CITY SCHOOL DISTRICT
BOARD OF EDUCATION,
Petitioner.

BRIEF FOR RESPONDENT IN OPPOSITION

EUGENE GREEN
ANTHONY P. SGAMBATI II and
BARRY R. LAINE
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

No. 75-1278

FRED DOYLE,
Respondent,

vs.

MT. HEALTHY CITY SCHOOL DISTRICT
BOARD OF EDUCATION,
Petitioner.

BRIEF FOR RESPONDENT IN OPPOSITION

Respondent, Fred Doyle, hereby opposes granting the writ of certiorari in the above-captioned matter.

The opinions below, the basis of this Court's jurisdiction, and several of the Constitutional and statutory provisions involved are set out at pp. 2-4 and 20a-24a of the Petition. Additional statutory provisions involved are reproduced in the appendix to this Brief.

QUESTIONS PRESENTED

1. Whether a district court that properly assumes jurisdiction pursuant to 28 U.S.C. Section 1331 over a cause in which the demands of Plaintiff exceed the requisite jurisdictional amount,

is divested of jurisdiction where the ultimate relief afforded consists of reinstatement to a tenured teaching position and back pay in the amount of $5,158.00.

2. Whether the Mount Healthy City School District Board of Education, a substantially autonomous body politic, should be accorded Eleventh Amendment immunity.

3. Whether the nonrenewal of a public school teacher's contract may be based, in substantial part, on an unconstitutional reason.

COUNTER-STATEMENT OF THE CASE

This action was instituted by Fred Doyle, Respondent herein, a certificated teacher and an employee of Petitioner from 1966 through 1971. The basis of the action was the decision of Petitioner Board of Education to non-renew Doyle's teaching contract, a decision that was motivated by and predicated upon constitutionally impermissible factors. At the time of his nonrenewal, Mr. Doyle was eligible for tenure. Under Ohio law, Ohio Revised Code Section 3319.11, any unconditional renewal of Doyle's limited contract would have resulted in tenure automatically.

The Complaint was filed in the United States District Court for the Southern District of Ohio. Plaintiff Doyle alleged jurisdiction under 42 U.S.C. Section 1983 and 28 U.S.C. Sections 1331, 1343(3) and 1343(4). Named as Defendants were the Mount Healthy City School District Board of Education, as an entity, the constituent members of the Board of Education, and the Superintendent of the school system. The Board acknowledged that sovereign immunity was not a bar to this litigation and proceeded to defend the claim on the merits.

After trial, the District Court held that jurisdiction was properly conferred by 28 U.S.C. Section 1331. It, therefore, did not consider the alternative jurisdictional grounds recited in the Complaint. The Court held that a constitutionally impermissible reason, Doyle's public criticism of the school's faculty dress code, played a substantial part in the Board's decision to non-renew Fred Doyle's teaching contract.

The District Court proceeded to reinstate Plaintiff Doyle to a tenure teaching contract and awarded him backpay of $5,158.00. The Court further concluded that Doyle had vindicated an important public interest by this litigation and awarded him attorney fees in the amount of $6,343.16. All relief was awarded against the Mount Healthy Board of Education. The individually named Defendants—the Board members and the Superintendent—were dismissed. Since the Board has acknowledged its amenability to suit, the district court made no finding with respect to an Eleventh Amendment immunity claim.

The Mount Healthy Board of Education appealed to the Court of Appeals for the Sixth Circuit. The reviewing Court concluded that there was substantial evidence in the record to support the district court's findings, and that the lower court correctly held that the Board's refusal to renew Fred Doyle's teaching contract was based on a constitutionally impermissible reason. Accordingly, the Appellate Court affirmed that portion of the District Court judgment directing the reinstatement of Doyle and the award of compensatory damages. The Court of Appeals further concluded that an award of attorney fees was not proper and proceeded to vacate and set aside the award of attorney fees.

This cause is now before this Supreme Court of the United States on the Petition for Certiorari filed by the Mount Healthy School District Board of Education.

REASONS FOR DENYING THE WRIT

1. The Holding Below Is in Conformance With Settled Principles of Law and Does Not Conflict With Prior Decisions of This Court or Other Circuit Courts of Appeal.

A. A district court that properly assumes jurisdiction pursuant to 28 U.S.C. Section 1331 over a cause in which the demands of plaintiff exceed the requisite jurisdictional amount, is not divested of jurisdiction where the ultimate relief afforded consists of reinstatement to a tenured teaching position and backpay in the amount of $5,158.00.

Plaintiff Doyle alleged jurisdiction under 42 U.S.C. Section 1983 and 28 U.S.C. Sections 1331, 1343(3) and 1343(4). The district court concluded that jurisdiction was properly conferred by 28 U.S.C. Section 1331.[1] Petitioner challenges this finding, arguing that the requisite jurisdictional amount of $10,000 was not satisfied. Petitioner's claim is frivolous.

In *Horton v. Liberty Mutual Insurance Co.*, 367 U.S. 348 (1961), this Court announced the following standards to determine whether the jurisdictional amount is satisfied:

> "The general federal rule has long been to decide what the amount in controversy is from the complaint itself, unless it appears or is in some way shown that the amount stated in the complaint is not claimed 'in good faith.' In deciding this question of good faith we have said that it 'must appear to a legal certainty that the claim is really for less than the jurisdictional amount to satisfy dismissal.'" (footnotes omitted) *Horton v. Liberty Mutual Insurance Co.*, supra, at 353.

[1] Having so found, the trial court declined to consider alternative jurisdictional grounds. Since the district court made no findings with respect to the remaining jurisdictional allegations, and since 28 U.S.C. Section 1331 does vest jurisdiction over this cause, this Brief will not consider the alternative jusidictional claims recited in the Complaint.

The gravamen of the instant lawsuit is Petitioner's unconstitutional refusal to issue Doyle a tenured teaching contract. Respondent Doyle demanded by his Complaint, exclusive of interest and costs, reinstatement and the issuance of a tenured teaching contract, $50,000.00 in damages and attorney fees. The amount demanded included compensatory damages that had accrued as a result of the termination, and damages resulting from the denial of future employment attendant to the Board's refusal to issue a continuing contract.

Clearly, the sum demanded by the Complaint exceeds the statutory amount. Moreover, it represents a legitimate expectation given the deprivation of employment under a tenure contract. Indeed, as noted by the district court, the immediate financial deprivation suffered by Plaintiff's denial of a contract for the 1971-72 school year, exceeded $10,000.00. Further, the denial of a tenure contract affects future employment.

In determining whether the jurisdictional amount is satisfied, a federal court may look to future earnings, and the value of other employment benefits. See: *Chaudoin v. Atkinson*, 494 F. 2d 1323 (3rd Cir., 1974); *Nord v. Griffin*, 86 F. 2d 481 (7th Cir., 1936); *Friedman v. International Association of Machinists*, 220 F. 2d 808 (DC Cir., 1955); *White v. Bloomberg*, 345 F. Supp. 133 (Maryland, 1972), *Patterson v. City of Chester*, 389 F. Supp. 1093 (Pa., 1975). Given the deprivation of employment under a tenure contract, it cannot be said, to a "legal certainty," that Plaintiff's claim was for less than the statutory amount.

The district court clearly had jurisdiction over this cause. That jurisdiction is not divested, as Petitioner seems to be arguing, because the ultimate recovery consisted of $5,185.00 and rein-

statement under a continuing contract of employment. In so arguing, Petitioner incredibly fails to assign a monetary value to reinstatement under a tenure contract. This is clearly improper. See *Chaudoin v. Atkinson*, supra. Moreover, it is well settled that failure to recover the statutory amount does not divest a federal court of jurisdiction. As this court explained:

> "The inability of Plaintiff to recover an amount adequate to give the court jurisdiction does not show his bad faith or oust the jurisdiction." *St. Paul Indemnity Co. v. Red Cab Co.*, 303 U.S. 283, at 289.

Even if one assumes that the ultimate recovery fell below the jurisdictional requisite, this would not deprive the federal court of jurisdiction.

Patently, more than $10,000.00 is in controversy in the instant cause. Since Petitioner does not deny the existence of a federal question, it is manifest that jurisdiction is conferred by 28 U.S.C. Section 1331.

B. The Mount Healthy City School District Board of Education is a substantially autonomous body politic and should not be accorded Eleventh Amendment immunity.

Petitioner School Board claims that the Eleventh Amendment precludes an award of damages. It is clear that only a state, and not local governmental entities, can claim the protection of the Eleventh Amendment. Plainly, the exemption of political subdivisions from the operation of the Eleventh Amendment is well recognized and has been consistently reaffirmed by this Court. See *County of Lincoln v. Luning*, 133 U.S. 529 (1890), *Hopkins v. Clemson College*, 221 U.S. 636 (1911), *Griffin v. School Board of Prince Edward County*, 377 U.S. 218 (1964), *Edelman v. Jordan*, 415 U.S. 651, at 667, n. 12 (1974).

The Mount Healthy City School District is a local governmental body created by the laws of Ohio, and vested by those laws with extensive powers and authority. By virtue of the Ohio statutory framework, this Defendant is a local governmental body that is substantially independent from the state, and, therefore, does not enjoy that immunity reserved for the state.

Ohio boards of education are comprised of local officials (Ohio Revised Code, Section 3313.01). The responsibilities of each board is limited to the schools within the district (Ohio Revised Code, Section 3313.47). Legal representation is afforded by county prosecuting attorneys or city solicitors (Ohio Revised Code, Section 3313.35). The local nature of district boards of education should be contrasted with the State Board of Education created by Chapter 3301, Ohio Revised Code. The State Board of Education has statewide duties and is represented by the Attorney General, the state's attorney.

Ohio school boards are accorded a great deal of autonomy. Their status and powers are enumerated in Chapter 3313, Revised Code. Each school board is a "body politic and corporate" (Revised Code 3333.17).[2] Among the powers granted boards of education in Chapter 3313 of the Code is the capability to sue and be sued, to contract and be contracted with, to acquire, hold, possess and dispose of real and personal property (Revised Code 3313.17); to make rules and regulations for its government and the government of its employees, pupils, and other persons entering school grounds (Revised Code 3313.20); and to manage and control all the public schools in its district (Revised Code 3313.47). In exercising these broad grants of power,

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[2] Indeed, at trial, Petitioner Board acknowledged that 3313.17, Ohio Revised Code, would constitute a waiver of sovereign immunity if the Board was deemed to have such immunity. Since Respondent is confident that the Eleventh Amendment cannot be invoked by this Defendant, the reach of 3313.17, or its effect as a waiver, will not be addressed herein.

Ohio boards of education are invested with extensive discretionary authority. See, e.g., *Greco v. Roper*, 145 O. St. 243 (1945), *State ex rel. Ohio High School Athletic Association v. Judges of Court of Common Pleas of Stark County*, 173 Ohio St. 239 (1962), *Dayton Classroom Teachers Association v. Dayton Board of Education*, 41 Ohio St. 2d 127 (1975). Because of the powers afforded local boards of education, and the discretion allowed boards in the exercise of these powers, Petitioner Board should be deemed an autonomous governmental unit and thereby not entitled to sovereign immunity.

One of the purposes of the Eleventh Amendment is to protect state treasuries. In *Edelman v. Jordan*, supra, at 663, this Court observed:

> "the rule has evolved that a suit by private parties seeking to impose a liability which must be paid from public funds in the state treasury is barred by the Eleventh Amendment."

Pursuant to Ohio Revised Code, Chapter 5705, an Ohio school board has taxing powers. Indeed, the majority of school district funding is derived from local property taxes and not from state revenues. See *Baldwins Ohio School Law*, Section T123.02, page 148. Consequently, it cannot be said that the judgment rendered in the instant case "must" be satisfied by the state treasury.

To support its claim of immunity, Petitioner depends primarily upon state decisional law which purportedly accords Ohio school boards immunity. However, Ohio law clearly recognizes that school boards do not possess that immunity reserved to the state. In *State ex rel. Board of Education v. Gibson*, 130 Ohio St. 318 (1935), the Ohio Supreme Court held that the state's sovereign immunity would not be extended to local boards of education. The Court's unanimous opinion was announced in the First Syllabus:

> "Immunity attaching to the State does not accrue to the benefit of a board of education or school district." *State ex rel. Board of Education v. Gibson*, supra, at 318.

Admittedly, the Ohio courts have carved out a narrow tort immunity for school boards. But the immunity fashioned by the Ohio courts, and relied upon by Petitioner, is narrowly limited to common torts, and is not a recognition that school boards share the sovereignty reserved for the State.

Prior to the instant cause, a three judge district panel in *Lopez v. Williams*, 372 F. Supp. 1279 (SO Ohio, 1973), aff'd. sub. nom, *Goss v. Lopez*, 419 U.S. 565 (1975), concluded that the Columbus Board of Education "is not immune from suit," *Lopez v. Williams*, supra, at 1294. The conclusion of the *Lopez* court and that of the courts below in the instant cause is consistent with numerous federal decisions which recognize that local school boards are not insulated by the Eleventh Amendment. See: *Burt v. Board of Trustees*, 521 F. 2d 120 (4th Cir., 1975); *Adams v. Renkin County Board of Education*, 524 F. 2d 928 (5th Cir., 1975); *Hutchinson v. Lake Oswego School District*, 519 F. 2d 961 (9th Cir., 1975); *Fabrizio and Martin, Inc. v. Board of Education*, 290 F. Supp. 945 (N.Y., 1968); *King v. Caesar Rodney School District*, 396 F. Supp. 423 (Del., 1975); *Morris v. Board of Education*, 401 F. Supp. 188 (Del., 1975); *Smith v. Concordia Parish School Board*, 387 F. Supp. 887 (Lou., 1975); *Seamon v. Spring Lake Park Independent School District*, 387 F. Supp. 1168 (Minn., 1974). These courts concluded, as did the court below, that a local school district is not a state agency for purposes of the Eleventh Amendment.

Thus, the Eleventh Amendment is not a bar to the lower court's assumption of jurisdiction to redress the constitutional wrongs inflicted upon Respondent Doyle.

C. **The nonrenewal of a public school teacher's contract lawfully may not be based, in substantial part, on an unconstitutional reason.**

Upon notification of his nonrenewal, Respondent Doyle requested reasons for the Board's action. The Petitioner Board, through its Superintendent, responded by letter. One reason cited in the letter was a telephone call to a radio station during which Doyle discussed a newly implemented dress code for teachers. During the call, Doyle accurately described the announced School Board's policy. At trial, several Board members cited this incident as a reason for the nonrenewal.

The district court concluded that the call to the radio station was constitutionally protected activity and could not be the basis for Doyle's discharge. While other reasons may have been present, the lower court held that a nonrenewal could not stand that is based, in part, on a constitutionally defective reason. In so holding, the lower court applied the well-settled principle that, even if a teacher's exercise of First Amendment rights of speech and association is only partially a factor in the nonrenewal, the nonrenewal is still constitutionally impermissible. See *Gray v. Union County Intermediate Education District*, 520 F. 2d 803 (9th Cir., 1975). *Skehan v. Board of Trustees of Bloomsburg State College*, 501 F. 2d 31, 39 (3rd Cir., 1974), vacated and remanded on other issues, 421 U.S. 983; *Fluker v. Alabama State Board of Education*, 441 F. 2d 201, 210 (CA 5, 1971); *Gieringer v. Center School District No. 58*, 477 F. 2d 1164, 1166 (CA 8, 1973); *Cook County Teachers Union Local 1600 AFT v. Byrd*, 456 F. 2d 882, 888 (CA 7, 1971); *Simard v. Board of Education*, 473 F. 2d 988, 995 (2nd Cir., 1973); *Roth v. Board of Regents*, 310 F. Supp. 972, 981, 982 (Wisc., 1970), aff'd. 466 F. 2d 806 (CA 7, 1971), rev'd and rem. on other grounds, 408 U.S. 564; *Dause v. Bates*, 369 F. Supp. 139, 147 (Ken., 1973); *Lusk v. Estes*, 361 F. Supp. 653, 660 (Tex., 1973).

Petitioner claims that other reasons would support its decision to nonrenew Doyle's teaching contract. It suggests that the alleged presence of other reasons should somehow excuse the Board's admitted reliance upon a constitutionally impermissible reason.

Petitioner, citing *Pickering v. Board of Education*, 391 U.S. 563 (1968), first urges the court to balance the First Amendment claims against the need for orderly school administration. In *Pickering v. Board of Education*, 391 U.S. 563 (1968), this Court held that a teacher's public criticism of his superiors on matters of public concern is constitutionally protected and constitutes an impermissible basis for termination of his employment. The teacher in *Pickering* wrote a letter to a newspaper criticizing certain school policies. Fred Doyle communicated his displeasure with certain school policies by telephone call to a radio station. There is no significant difference between the teacher involved in *Pickering* and Respondent Doyle.

Pickering does allude to a balancing test. But the balancing referred to in *Pickering* concerned whether a constitutional right was exercised in such an offensive manner as to undermine orderly school administration and thereby forfeit constitutional protection. In the instant cause, Petitioner School Board did not claim that the information imparted by Doyle to the radio station was false or defamatory, or that it interfered with Doyle's classroom duties or the operation of school. Thus, under *Pickering*, the call would enjoy constitutional protection. No constitutionally acceptable reason for a discharge was relied upon in *Pickering*. Thus, *Pickering* did not address the situation where an unconstitutional reason was weighed against reasons that were not constitutionally infirm.

Petitioner further claims that "No prior court has required a reinstatement unless the constitutionally impermissible reasons played a *substantial* part in the nonrenewal". (Emphasis that

of Petitioner). Petitioner apparently seeks to distinguish between a discharge predicated in part on an improper reason, and a discharge based in "substantial" part on an improper reason. Whatever the value of the distinction, the lower court found that "a non-permissible reason did play a substantial part" in the nonrenewal decision. This factual finding was affirmed on appeal. Thus, the decision of the court below would satisfy even the standard urged by Petitioner.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

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APPENDIX

In addition to the statutes cited in the Petition, the following provisions of the Ohio Revised Code are also involved in this proceeding:

[MEMBERSHIP]

§ 3313.01 Membership of boards of county, local and exempted village school districts. (GC § 4832)

In county, local, and exempted village school districts, the board of education shall consist of five members who shall be electors residing in the territory composing the respective districts and shall be elected at large in their respective districts.

§ 3313.20 Rules and regulations; employee attendance at professional meetings, expenses.

The board of education shall make such rules and regulations as are necessary for its government and the government of its employees, pupils of its schools, and all other persons entering upon its school grounds or premises. Rules and regulations regarding entry of persons other than students, staff, and faculty upon school grounds or premises shall be posted conspicuously at or near the entrance to such grounds or premises, or near the perimeter of such grounds or premises if there are no formal entrances, and at the main entrance to each school building. Any employee may receive compensation and expenses for days on which he is excused, in accordance with the policy statement of the board, by the superintendent of such board or by a responsible administrative official designated by the superintendent for the purpose of attending professional meetings as defined by the board policy, and the board may provide and pay the salary of a substitute for such days. The expenses thus incurred by an employee shall be paid by the board from the appropriate fund of the school district or the county board fund provided that

statements of expenses are furnished in accordance with the policy statement of the board.

Each city, local, and exempted village school district shall adopt a written policy governing the attendance of employees at professional meetings.

§ 3313.35 Counsel for school boards.

Except in city school districts, the prosecuting attorney of the county shall be the legal adviser of all boards of education of the county in which he is serving. He shall prosecute all actions against a member or officer of a board for malfeasance or misfeasance in office, and he shall be the legal counsel of such boards or the officers thereof in all civil actions brought by or against them and shall conduct such actions in his official capacity. In joint vocational school districts the legal adviser shall be the prosecuting attorney of the most populous county containing a school district which is a member of the joint vocational school district. When such civil action is between two or more boards in the same county, the prosecuting attorney shall not be required to act for either of them. In city school districts, the city solicitor shall be the legal adviser and attorney for the board thereof, and shall perform the same services for such board as required of the prosecuting attorney for other boards of the county. Such duties shall devolve upon any official serving in a capacity similar to that of prosecuting attorney or city solicitor for the territory wherein a school district is situated regardless of his official designation. In a district which becomes a city school district pursuant to section 3311.10 of the Revised Code, the legal adviser shall be the solicitor of the largest of the municipal corporations all or a part of which is included within the school district boundaries. No compensation in addition to such officer's regular salary shall be allowed for such services.

§ 3313.47 Management and control of schools vested in board of education. (GC § 4836)

Each city, exempted village, or local board of education shall have the management and control of all of the public schools of whatever name or character in its respective district. If the board has adopted an annual appropriation resolution, it may, by general resolution, authorize the superintendent or other officer to appoint janitors, superintendents of buildings, and such other employees as are provided for in such annual appropriation resolution.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

No. 75-1278

MT. HEALTHY CITY SCHOOL DISTRICT
BOARD OF EDUCATION,

Petitioner,

vs.

FRED DOYLE,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF OF PETITIONER

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MT. HEALTHY CITY SCHOOL DISTRICT
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FRED DOYLE,

Respondent.

BRIEF OF PETITIONER

This is an appeal from a decision of the United States Court of Appeals, Sixth Circuit, affirming the decision of the United States District Court, Southern District of Ohio, reinstating the Respondent and awarding him compensatory damages.

OPINION OF THE COURT BELOW

The decision and opinion of the United States Court of Appeals for the Sixth Circuit is reprinted in the Appendix at pp. 17-30. The decision and opinion of the United States District Court for the Southern District of Ohio, Western Division, is reprinted in the Appendix, beginning at p. 34. Neither opinion has been reported officially.

JURISDICTION

The judgment of the Court of Appeals was entered on December 10, 1975. The jurisdiction of this Court is evoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

U.S. Constitution, Amendment I

Congress shall make no law . . . abridging the freedom of speech . . . .

U.S. Constitution, Amendment XI

The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another State, or by citizens or subjects of any foreign State.

FEDERAL STATUTES INVOLVED

28 U.S.C., Section 1331

§ 1331. Federal question; amount in controversy; costs

(a) The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States.

(b) Except when express provision therefor is otherwise made in a statute of the United States, where the plaintiff is finally adjudged to be entitled to recover less than the sum or value of $10,000, computed without regard to any setoff or counterclaim to which the defendant may be adjudged to be entitled, and exclusive of interests and costs, the district court may deny costs to the plaintiff and, in addition, may impose costs on the plaintiff.

§ 1343. Civil rights and elective franchise

The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

(1) To recover damages for injury to his person or property, or because of the deprivation of any right or privilege of a citizen of the United States, by any act done in furtherance of any conspiracy mentioned in section 1985 of Title 42;

(2) To recover damages from any person who fails to prevent or to aid in preventing any wrongs mentioned in section 1985 of Title 42 which he had knowledge were about to occur and power to prevent;

(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;

(4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote. June 25, 1948, c. 646, 62 Stat. 932, Sept. 3, 1954, c. 1263, § 42, 68 Stat. 1241; Sept. 9, 1957, Pub.L. 85-315, Part III, § 121, 71 Stat. 637.

42 U.S.C., Section 1983

§ 1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

PROVISIONS OF THE OHIO CONSTITUTION INVOLVED

PROVISIONS OF THE OHIO STATUTES INVOLVED

QUESTIONS PRESENTED

1. Whether a Board of Education can be forced to give a continuing contract to a non-tenured teacher it considers too immature for the position, if one of the many factors on which the Board's decision is based is a telephone call to a local radio station, such call allegedly being within the First Amendment rights of the teacher?

2. Whether the District Court has jurisdiction over this suit since the Mt. Healthy Board of Education is not a "person" within the meaning of 42 U.S.C. § 1983 and the plaintiff could not properly contemplate $10,000 as the amount in controversy for a suit under 28 U.S.C. § 1331?

3. Whether the Mt. Healthy City School District Board of Education is immune from suit under the sovereign immunity protection of the Eleventh Amendment of the United States Constitution?

STATEMENT OF THE CASE

This case originated in a suit filed by Fred Doyle, Respondent, against the Mt. Healthy Board of Education, its members individually, and the Superintendent, for reinstatement, compensatory and punitive damages under 42 U.S.C. § 1983, 28 U.S.C. §§ 1331, 1343(3) and 1343(4). Doyle alleged that his limited teaching contract was not renewed in retaliation for the exercise of his constitutionally protected First Amendment rights; in particular he cited a telephone call to a local radio station criticizing the faculty dress code. Petitioners responded that Doyle's contract was not renewed as the result of a routine annual review of his performance as a teacher and not in retaliation for the exercise of his constitutionally protected rights.

The District Court ordered the Board to reinstate Doyle and to grant him a continuing contract. The Court awarded $5,158.00 in back pay and an additional $6,343.16 in attorneys' fees. The Court further rendered judgment in favor of the individual Board members and the superintendent. Costs were to be assessed against the Board. The Court stated that the Board was faced with a situation "in which there did in fact exist reason independent of any First Amendment rights or exercise thereof, to not extend tenure." (A. 27-28) (Citation omitted.) Nevertheless, the Court concluded that one impermissible reason – the telephone call to the radio station – played a substantial part in Doyle's nonrenewal.

The Board appealed to the Court of Appeals for the Sixth Circuit and that Court affirmed the reinstatement and the compensatory damages but vacated the award of attorney fees.

STATEMENT OF FACTS

Fred Doyle was employed as a teacher by the Mt. Healthy Board of Education under a series of limited contracts beginning in 1966. In accordance with section 3319.11 of the Ohio Revised Code, Doyle was notified prior to April 30, 1971, of the Board's decision not to reemploy him (Jt. Ex. 4, A. 287, R. 4).

The Board was under no contractual or statutory duty to offer him a contract for 1971-72. However, had the Board decided to rehire Doyle, Section 3319.11, Revised Code, would have compelled them to grant him a continuing contract. In response to a request by Doyle, the Superintendent advised him by letter that the following reasons for his non-renewal had been submitted to the Board:

> "1) You have shown a notable lack of tact in handling professional matters which leaves much doubt as to your sincerity in establishing good school relationships.
>
> A. You assumed the responsibility to notify W.S.A.I. Radio Station in regards to the suggestion of the Board of Education that teachers establish an appropriate dress code for professional people.[1] This raised much concern not only within this community, but also in neighboring communities.
>
> B. You used obscene gestures to correct students in a situation in the cafeteria causing considerable concern among those students present." (Jt. Ex. 7, A. 287, R. 4)

In the transcript, the individual board members stated that they also considered other evidence, Mrs. Haupt recalled the "Hinkle" incident when, as the result of an altercation between Mr. Doyle and Mr. Hinkle, another teacher, the teachers staged a protest which required all the high school students to be dismissed at noon (A. 177);[2] the spaghetti incident (Def. Ex. 1, A. 292-293, R. 529) when Doyle insisted on a second portion of food and insulted the kitchen staff (A. 188); and an occasion when Mrs. Haupt believed Doyle had lied (A. 193); as well as the WSAI incident (A. 298) and the gesture incident (Def. Ex. 5, A. 297, R. 537) when Doyle gave students he was reprimanding a two-fingered sign signifying "bull ——" (A. 195). Mrs. Haupt summarized her decision as not wanting to retain "for the rest of his teaching life" a teacher who did not demonstrate "the maturity . . . expected of a 29-year old . . . ." (A. 196).

Mr. Morris similarly testified that he was aware of the WSAI incident (A. 211-212) and the gesture incident (A. 267), but he stated repeatedly his concern about Doyle's failure to improve his maturity despite admonitions to do so. (A. 203, 212, 213, 267) Mrs. Clark was also concerned about the way Doyle handled a fight in the snack bar (A. 232, 236, 239). She explicitly stated in response to a question that the WSAI call alone did not justify the nonrenewal (A. 237). Mr. Lippmeier stated that, although he was aware of the Hinkle incident and the obscene gesture (A. 221), his decision was based on his knowledge of Doyle's immaturity (A. 224-225, 268). Mr. Lippmeier further testified about a situation in which Doyle promised all his students an automatic "A" if they would work on a pancake supper and of an occasion when Doyle permitted students to make posters in his class in support of a suspended teacher (A. 229). He concluded that the reason for the non-renewal was not simply the W.S.A.I. call (A. 229). The Superintendent also related an incident in which Doyle referred to some students as "SOB's" (A. 253).

The record, thus, amply demonstrates that the reasons for the non-renewal covered a range of situations in which the Board found Mr. Doyle's conduct unsatisfactory.

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[1] A copy of the Memorandum to Teachers is attached at pp 294-296 of the Appendix.

[2] Mr. Hinkle apparently slapped Mr. Doyle who refused to accept his apology. Both teachers were suspended until they could settle their differences. At that point the rest of the faculty gathered in the auditorium and the buses had to be called to take the students home.

The evidence also established that the Mt. Healthy Board of Education reviewed the performance of every teacher in the district before offering contracts in the spring of each year (A. 183, 207, 219, 268). At the same time that the decision was made not to rehire Mr. Doyle, nine other teachers were also notified that they would not receive a new contract for the 1971-72 school year. (Jt. Ex. 1, A. 273-274, R. 3). Four besides Doyle taught at the High School and one of those (Diane Holmes) had received a higher performance rating than had Doyle. Of all eighty-eight teachers at the High School that year, only twenty-five were rated as low or lower than Doyle. Of those, four, including Doyle, were not renewed, four had tenure and ten were not eligible for continuing contracts. The others taught in special fields, improved that year, or were characterized as cooperative and receptive. (A. 96-102, Jt. Ex. 3, A. 280-286, R. 3). In reviewing the evidence Judge Hogan of the District Court concluded that, when reaching their decision on Doyle,

> "both the Board and the Superintendent were faced with a situation in which there did exist in fact reason independent of any First Amendment rights or exercise thereof, to not extend tenure. . . . As we see it and find it as a fact, the Superintendent and the Board were faced with a situation in which there were a number of moving causes, some permissible and some not permissible. The action based thereon, whatever its legal consequences, cannot be described as arbitrary or retaliatory or malicious or marked by bad faith." (A. 27-28)

Yet, having dismissed the individuals, he decided against the Board.

SUMMARY OF ARGUMENT

1. The Board's decision to not offer Doyle a continuing contract was not because of his call to a local radio station.

The Board notified Doyle of its decision to not renew his contract pursuant to Section 3319.11, Ohio Revised Code. No reasons were required and none were given. On Doyle's request, the Superintendent wrote that the Board had considered the radio call in reaching its decision. The Board members, however, testified that they had acted on the basis of Doyle's immaturity and lack of tact. The District Court dismissed them. Even under *Pickering* v. *Board of Educ.*, 391 U.S. 563 (1968), it is not clear that the call would be protected and *Pickering* does not hold that one impermissible reason contaminates an otherwise proper decision. The District Court erred in ordering reinstatement in this case.

2. The Court does not have jurisdiction.

The case against the Mt. Healthy Board of Education should be dismissed for lack of jurisdiction because the board is not a "person" under 42 U.S.C. § 1983. The rationale of *Monroe* v. *Pape*, 365 U.S. 167 (1961), applies to school boards which even more than municipal corporations operate as the administrative arm of the state. Furthermore, in this case, the individual members were dismissed for failure to state a cause. Absent the conduct of the individual members, there are no grounds to find the board liable.

Jurisdiction under 28 U.S.C. § 1331 should not attach because the plaintiff never had a good faith claim that could under any circumstances amount to $10,000.

3. The Mt. Healthy Board of Education is immune from suit.

The Eleventh Amendment, as interpreted by *Hans* v. *Louisiana*, 134 U.S. 1 (1890), bars suit by a citizen against an

unconsenting state. Ohio has not consented to suit under 42 U.S.C. § 1983. Education is the primary responsibility of the state in Ohio. The local boards have only those powers expressly delegated by the General Assembly. The General Assembly sets policy, including the procedures for not renewing non-tenured teachers. Since the Mt. Healthy Board of Education is merely the administrative arm of the State of Ohio, and since the Board in this case was acting pursuant to state law, and since the board members were dismissed individually, and since immunity has not been waived, the protection of sovereign immunity should be recognized in this case. Even under 28 U.S.C. § 1331, we have found no cases that award money damages against a state.

THE ARGUMENT

1. THE COURT BELOW ERRED IN CONCLUDING THAT THE BOARD REFUSED TO REINSTATE DOYLE FOR A CONSTITUTIONALLY IMPERMISSIBLE REASON.

a. The Board was not compelled to give any reasons for its decision to not renew Doyle's limited contract. In including the telephone call to the radio station as an illustration of Doyle's lack of tact, the Superintendent did not violate the teacher's First Amendment rights.

Fred Doyle had a limited contract with the Mt. Healthy Board. Section 3319.11, Ohio Revised Code, sets out the procedures for employment of teachers on a limited contract; should the board choose not to renew a limited contract, it is not required to give reasons for that decision. In *De Long* v. *Board of Educ.*, 37 Ohio App. 2d 69, 306 N.E.2d 774, *aff'd* 36 Ohio St. 2d 62 (1973) the court upheld a refusal of a school board to rehire a teacher without giving any reasons at all. Similarly, *Orr* v. *Trinter*, 29 Ohio Misc. 149, 444 F.2d 128 (1971), reversing 29 Ohio Misc. 62, 318 F.

Supp. 1041 (1970), held that a public school teacher who has not attained tenure status and whose contract of employment is not renewed does not have a constitutionl right to be told the reason for the non-renewal, nor to a hearing. See also *Conque* v. *Gausche*, 5th Cir. 3/14/75, *cert. denied* 10/14/75; *Board of Trustees of University of Tennessee* v. *Soni*, 513 F.2d 347 (6th Cir. 1975), *petition for cert. filed* 7/29/75; *Cusumano* v. *Ratchford*, 507 F.2d 980 (8th Cir. 1975); *Jeffries* v. *Turkey Run Consolidated School Dist.*, 492 F.2d 1 (7th Cir. 1974).

It is not disputed that the Board could have not renewed Doyle's contract without giving any reason. In fact, in its official communication, the Board did just that (Jt. Ex. 4, A. 287, R. 4). Doyle's claim, however, stems from a letter written at his request by the Superintendent. In that letter the Superintendent gave one reason for the non-renewal:

> "You have shown a notable lack of tact in handling professional matters which leaves much doubt as to your sincerity in establishing good school relationships."

The Superintendent offered two illustrations of Doyle's lack of tact: an obscene gesture he made to students and the phone call. The letter standing alone does not justify a conclusion that the Board based its decision substantially on the phone call because (1) the Superintendent, not the Board, wrote the letter and (2) in it expressly stated that the reason was Doyle's lack of tact. When the Board members were questioned individually as to the reasons for their decision they mentioned several incidents in which they thought Doyle had failed to show an ability to handle his responsibilities including an incident arising out of an altercation with a faculty member which resulted in the school having to be closed at noon, a problem occurring when Doyle confronted the cafeteria staff demanding a larger portion of spaghetti, a time when Doyle referred to some trouble-making boys as "sons of bitches," and his management of a cafeteria fighting incident, as well as the obscene gesture and phone call.

The constitutional test for the violation of a teacher's First Amendment rights was developed in *Pickering* v. *Board of Educ.*, 391 U.S. 563 (1968), where the court considered the dismissal of a teacher who sent a letter to a local newspaper critical of the manner in which the Board had handled a bond issue. In holding in favor of the teacher, the Court noted the need to balance the First Amendment claims of the teacher against the need for orderly school administration. 391 U.S. at 568.

Pickering identified five factors to consider in analyzing the balance between the two: (1) the impact of the statements on the day to day operation of the school; (2) interference with the teacher's performance of daily duties; (3) the impact on relations with superiors and co-workers; (4) the public impact of the statements; and (5) the subject matter of the statement. Under these tests it should be noted that the WSAI phone call adversely affected public opinion of the school system (A. 86, 109, 199, 237); had a negative effect on Doyle's relationship with his principal (A. 89); and was more in the nature of a personal grievance than a matter of public concern. Furthermore, some of the other incidents – primarily the Hinkle episode – sufficiently disrupted the operation of the school program as to be clearly beyond constitutional protection as outlined by *Pickering*.

Applying the *Pickering* test an Indiana court in *Knarr* v. *Board of School Trustees of Griffith, Indiana*, 317 F.Supp. 832 (1970), *aff'd* 452 F.2d 649 (7th Cir. 1972), refused to order reinstatement of a teacher dismissed in part because of insubordination. One example of the teacher's improper behavior occurred when he was requested to discuss the school dress code and enlist student support. Instead he advised his class that they could defeat the adminitration by violating the code en masse because the school could not send everyone home. Other reasons included his disparaging comments about school administrators and other personnel. Plaintiff had alleged he was not given tenure because of his union activities but the court did not sustain such a finding.

The district court noted the broad discretion entrusted to the Board especially when considering whether to offer tenure and concluded in 317 F.Supp. at 836:

> "In denying Plaintiff tenure the school administrators were not acting with a desire to deprive Plaintiff of his freedoms of speech and association. The First Amendment freedoms of a teacher are not necessarily affected by the right of the school board to retain only those teachers who adequately discharge their teaching responsibilities and do not disrupt the efficient operation of the school. To the extent that this is a restriction of the freedom of a teacher, it is only incidental to the exercise of the school board's duty to maintain good schools."

Similarly, in *Parker* v. *Board of Educ. of Prince George County, Md.*, 237 F.Supp. 222, 229 (D.C. Md. 1965), *aff'd* 348 F.2d 464, *cert. denied* 382 U.S. 1030, *reh. den.* 383 U.S. 939, the court noted that the First Amendment rights of a teacher are not absolute:

> "Where the abandonment of the abstract right of free speech results from government action taken for the protection of other substantial public rights, no constitutional deprivation will be found to exist." *American Communications Ass'n, CIO* v. *Douds*, 339 U.S. 382 (1950).

The state legislature has given the Mt. Healthy Board broad discretion to hire faculty. The Mt. Healthy Board members repeatedly testified that their decision was based on several incidents which conveyed to them the fact that Doyle had failed to demonstrate the maturity necessary to make a good teacher. In coming to that decision the Board acted within the lawful limits of its discretion. Doyle's behavior had disrupted the good operations of the school. Under *Pickering*, the Board is entitled to judgment in its favor.

b. Even the presence of one constitutionally impermissible factor does not necessarily invalidate a school board's employment decision.

Although the Sixth Circuit Court of Appeals presumed that a non-renewal is constitutionally impermissible even if the teacher's exercise of First Amendment rights was only partially a factor in the non-renewal, no prior court has ordered reinstatement unless the constitutionally impermissible reason played a substantial part in the non-renewal. If other valid grounds exist, the decision should be affirmed. *Gieringer* v. *Center School Dist. No. 58,* 477 F.2d 1164 (8th Cir. 1973); *Lusk* v. *Estes,* 361 F.Supp. 653 (N.D. Tex. 1973). In the following cases, the courts upheld the Board's action despite the teacher's claim: *Gray* v. *Union County Intermediate Educ. Dist.,* 520 F.2d 803 (9th Cir. 1975), *Sinair* v. *Board of Educ.* 473 F.2d 988 (2d Cir. 1973); *Cook County Teachers Union, Local 1600 A.F.T.* v. *Boyd,* 456 F.2d 882 (7th Cir. 1971), cert. denied 409 U.S. 848, reh. denied 414 U.S. 883 (1973); *Fluker* v. *Alabama State Board of Educ.,* 441 F.2d 201 (5th Cir. 1971), and *Morgan* v. *Sylvester,* 125 F.Supp. 380 (S.D. N.Y. 1954), aff'd 220 F.2d 758, cert. denied, 350 U.S. 867 (1955).

Skehan v. *Board of Trustees of Bloomsburg State College,* 501 F.2d 31 (3d Cir. 1974), and *Roth* v. *Board of Regents,* 310 F.Supp. 972 (Wis. 1970), aff'd 446 F.2d 806 (7th Cir. 1971), rev. and rem. on other grounds, 408 U.S. 564 (1972), include dicta that a decision to not renew will be set aside if partially premised on impermissible reasons, but neither court holds that one impermissible reason contaminates an otherwise proper decision since the decisions were on other grounds. In *Skehan,* the court remanded the case to determine inter alia whether the facts supported the teacher's claim (501 F.2d at 45), and in *Roth* the issue of whether the teacher was fired even in part for constitutionally protected activity was never decided because the court relied instead on the procedural due process point. (310 F.Supp. at 983).

Danse v. *Bates,* 369 F.Supp. 139 (N.D. Ky. 1973), clarifies the issue. There, three principals and three teachers all engaged in the same activity. The board demoted the three principals and one of the teachers *solely* in retaliation for the constitutionally protected conduct (369 F.Supp. at 148). The court ordered them reinstated. Yet the other two teachers, who were not offered contracts at the same time, were not reinstated because the court found other reasons unrelated to the First Amendment conduct justified those decisions.

This case exemplifies the test suggested by a commentator[3] who warned that if any impermissible reason is allowed to bar dismissal, a teacher might participate in unpopular conduct just to insure employment.

> "It is conceivable that a teacher might openly engage in activities which, although controversial, are constitutionally protected, and thereby make it difficult for a school board to even attempt to terminate his employment despite the presence of unquestionably valid grounds for non-renewal. This is expecially (sic) true in situations where school officials would be unable to candidly deny that the teacher's 'extra-curricular activities' played no part in the decision to deny employment. Therefore it seems imperative that the improper motivation be the primary cause of non-renewal before judicial relief is granted."

In *Callahan* v. *Superintendent of Educ. of Leske County, Miss.,* 505 F.2d 83, 513 F.2d 51 (5th Cir. 1975), cert. denied 11/4/75, the Court upheld the non-renewal of a non-tenured superintendent whose employment was terminated because of community opposition, even though some of the opposition was racially motivated by the superintendent's efforts to comply with desegregation orders. The record in the instant case as in *Callahan,* supplies ample acceptable reasons to warrant

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3 "Refusal to Rehire a Nontenured Teacher for a Constitutionally Impermissible Reason." 1970 Wis. L. Rev. 162, 169.

the Board's non-renewal decision; that decision should be upheld.

2. THE DISTRICT COURT DOES NOT HAVE JURISDICTION OF THIS MATTER.

a. A board of education is not a "person" under 42 U.S.C. § 1983 subject to money damages.

Section 1983 of Title 42 of the United States Code was originally enacted as part of the Civil Rights Act of 1871 which was passed to enforce the provisions of the Fourteenth Amendment of the Constitution at a time when authorities in some states were unwilling or unable to protect the rights of the recently freed slaves and those who sympathized with them.[4] The effect of the Act was to prohibit states from passing legislation restricting the rights and privileges of its citizens,[5] to provide a federal remedy where state law was inadequate,[6] and more importantly to grant federal jurisdiction when the state courts, although sufficient in theory, were not adequate in practice.[7] The remedy provided under section 1983 of the act runs against those officials who use their authority to deny citizens their civil rights. The pertinent language reads:

[4] Cong Globe, 42 Cong, 1st Sess, p. 244.

[5] Id., App. 268.

[6] Kentucky law for example did not recognize the testimony of a black man against a white man; however, were the suit brought in federal court, federal rules, which permitted the testimony, applied. Id. p. 345.

[7] Id., p. 374. Senator Beatty of Ohio described the need for the bill as follows:

> ". . . certain States have denied to persons within their jurisdiction the equal protection of the laws. The proof on this point is voluminous and unquestionable. . . . [M]en were murdered, houses were burned, women were outraged, men were scourged, and officers of the law shot down; and the State made no successful effort to bring the guilty to punishment or afford protection or redress to the outraged and innocent. The State, from lack of power or inclination, practically denied the equal protection of law to these persons." Id., at 428.

> ". . . every person . . . who under color of state law . . . subjects or causes any citizen to be deprived of any civil rights . . . is liable for personal injuries."

The act was construed in *Monroe* v. *Pape*, 365 U.S. 167 (1961), to apply to city policemen but not to the municipal corporation itself. Justice Douglas, writing for the majority,[8] noted that when the bill was in the Senate, Senator Sherman proposed an amendment which would have made "the inhabitants of the county, city or parish" liable "to pay full compensation" to persons injured by the acts of their officials.[9] Although passed by the Senate,[10] the House rejected the

[8] See the discussion at 365 U.S. 188-190.

[9] Cong Globe, 42 Cong, 1st Sess, p. 663. The proposed amendment read:

> "That if any house, tenement, cabin, shop, building, barn, or granary shall be unlawfully or feloniously demolished, pulled down, by any persons riotously and tumultuously assembled together, or if any person shall unlawfully and with force and violence be whipped, scourged, wounded, or killed by any person riotously and tumultuously assembled together; and if such offense was committed to deprive any person of any right conferred on him by the Constitution and laws of the United States, or to deter him or punish him for exercising such right, or by reason of his race, color, or previous condition and servitude, in every such case the inhabitants of the county, city, or parish in which any of the said offenses shall be committed shall be liable to pay full compensation to the person or persons damnified by such offense if living, or to his legal representative if dead; and such compensation may be recovered by such person or his representative by a suit in any court of the United States of competent jurisdiction in the district in which the offense was committed, to be in the name of the person injured, or his legal representative, and against said county, city, or parish. And execution may be issued on a judgment rendered in such suit and may be levied upon any property, real or personal, of any person in said county, city, or parish, and the said county, city, or parish may recover the full amount of such judgment, costs and interest, from any person or persons engaged as principal or accessory in such riot in an action in any court of competent jurisdiction.

[10] Id., at 704-705.

amendment,[11] and it was eventually dropped in conference.[12]

The objection to the Sherman amendment was that civil liability would paralyze local government by creating the potentiality of a lien against the city and hence impairing its credit.[13] Opponents further objected that the municipality could be found liable even though it had no knowledge of the misdeeds of its officials.[14] Finally, opponents argued that the federal government had no authority to impose duties or liabilities on counties and towns which are subdivisions of the states.[15]

The holding of *Monroe* v. *Pape*, has been extended to school districts, for school districts, even more than municipalities, are the administrative arm of the state. The following cases have all held that boards are not "persons" under 42 U.S.C. § 1983: *Singleton* v. *Vance County Board of Educ.*, 501 F.2d 429 (4th Cir. 1975); *Sterzing* v. *Fort Bend Independent School Dist.*, 496 F.2d 92 (5th Cir., 1974); *Huntley* v. *N.C. State Board of Educ.*, 493 F.2d 1016 (4th Cir., 1974); *Strickland* v. *Inlow*, 485 F.2d 186 (8th Cir., 1973), rev'd on other grounds sub nom. *Wood* v. *Strickland*, 420 U.S. 308, rehearing denied 95 S.Ct. 1589 (1975); *Harkless* v. *Sweeny Independent School Dist.*, 388 F.Supp. 738 (S.D. Tex., 1975); *Patton* v. *Conrad Area School Dist.*, 388 F.Supp. 410 (Del., 1975); *Brown* v. *Board of Educ., City of Chicago*, 386 F.Supp. 110 (D.C. Ill., 1974); *Howell* v. *Winn Parish School Board*, 377 F.Supp. 816 (D.C. La., 1974); *Lopez* v. *Williams*, 372 F.Supp. 1279 (S.D. Ohio, 1973), aff'd sub nom. *Goss* v. *Williams*, 413 U.S. 565 (1975); *Pelisek* v. *Trevor State Graded School Dist. No. 7, Salem, Wis.*, 371 F.Supp. 1064 (E.D. Wis., 1974); *Vanderzanden* v. *Trowell School Dist. No. 71*, 369 F.Supp. 67 (Ore., 1974); and *Bichrest* v. *School Dist. of Philadelphia*, 346 F. Supp. 249 (E.D. Pa., 1972). Contra, *Keckeisen* v. *Independent School Dist. 612*, 509 F.2d 1062 (8th Cir., 1975); *Aurora Educ. Ass'n* v. *Board of Educ., Aurora Public School Dist.*, 490 F.2d 431 (7th Cir., 1973), cert. denied 416 U.S. 985 (1974).

[11] Id., at 725, 800-810.

[12] Id., at 805.

[13] Cong Globe, 42d Cong, 1st Sess, 762.

[14] Id., at 788.

[15] Id., at 794.

The extension is consistent with the rationale of *Monroe* v. *Pape* and the arguments advanced in Congress in opposition to the Sherman amendment. School officials are still personally liable, but the federal court does not have jurisdiction over the board under 42 U.S.C. § 1983. *Wood* v. *Strickland*, 420 U.S. 308, reh. denied 95 S.Ct. 1589 (1975). In the present case, the District Court dismissed the individual board members for failure to establish a cause of action against them. The Board as an entity should be dismissed as well.

Courtney v. *School Dist. No. 1, Lincoln County, Wyo.*, 371 F.Supp. 401, 403 (Wyo., 1974) and *Porcelli* v. *Titus*, 302 F. Supp. 726, 730 (N.J., 1969) held that the application of section 1983 should be decided on the basis of the particular state law. The Ohio case – *Lopez* v. *Williams*, supra – determined that "the board of education was a political subdivision of the state and was therefore not a 'person' within the meaning of the Federal Civil Rights Statute, 42 USC § 1983." Accord: *Kramer* v. *Scioto Daily School Dist.*, (U.S. D.C., S.D. Ohio, E.D.) Case No. 72-406, decision March 7, 1974; *Gilliam* v. *Lewis, et al.*, (U.S. D.C., S.D. Ohio, E.D.), Case No. C2-73-287, decision, March 26, 1974. This reasoning is consistent with Ohio law discussed below in connection with sovereign immunity.

Occasionally courts have distinguished under 42 USC § 1983 between plaintiffs who ask for injunctive or other equitable relief and those seeking money damages. Money damages run against the district's treasury and therefore are barred by *Monroe* v. *Pape*, 365 U.S. 167, 187-192 (1961). In *City of Kenosha* v. *Bruno*, 412 U.S. 507 (1973), the court extended *Monroe* to equitable damages. The Court reasoned

that nothing in the act suggests that Congress intended the word "person" to have a different meaning depending on the nature of the relief sought. Municipalities were beyond the scope of section 1983 in either event.

Monroe and *Kenosha* are compatible with *Hague* v. *Committee for Industrial Organization*, 307 U.S. 496 (1938), a case involving the First Amendment rights of labor organizers. In *Hague*, Justice Roberts discussed the history of the Civil Rights Act of 1871 and its relationship to federal question jurisdiction which requires a statutory amount in controversy. The doctrine of *Hague* limits actions under the Civil Rights Act to those brought against individuals in which the "right assessed is inherently incapable of pecuniary valuation" as opposed to property rights. 307 U.S. at 531. Under *Hague* actions for compensatory damages involving property rights must be brought under federal question jurisdiction, 28 U.S.C. § 1331. See also *Kochhar* v. *Auburn University*, 304 F.Supp. 565 (M.D. Ala., E.D. 1969).

In the present suit, Doyle sued for reinstatement, compensatory and punitive damages. While some courts consider back pay as part of the equitable relief of reinstatement,[16] *City of Kenosha*, supra, would deny back pay regardless of what it is called. This policy is consistent with the Eleventh Amendment protection of state funds[17] and with the reasoning of *Monroe*. As Congressman Farnsworth argued in the original Civil Rights Act debates in 1871, to permit monetary recovery against a political subdivision on a cause of action created by Congress would "put the hand of the national government into [the local government's] treasury." Cong. Globe, 42d Cong, 762.

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[16] See, for example, *Board of Trustees of Ark A & M* v. *Davis*, 396 F.2d 730 (8th Cir. 1968) which granted jurisdiction under 42 U.S.C. § 1983 but denied the claim of back pay because of a sovereign immunity defense. See also *Monell* v. *Dept. of Social Services of City of N.Y.*, 394 F.Supp. 853 (1975).

[17] *Edelman* v. *Jordon*, 415 U.S. 651 (1974) discussed *infra*.

Since section 1983 of the Civil Rights Act does not apply to the Mt. Healthy School District because it is not a "person," the Court has no jurisdiction under to 28 U.S.C. §§ 1343 (3) and (4), for they merely support the section 1983 claim. *Harkless* v. *Sweeney Independent School Dist.*, 388 F.Supp. 738 (Tex. 1975).

b. Doyle has never had a claim that could be valued at $10,000 and therefore cannot bring the suit under 28 U.S.C. § 1331.

In analysing the application of *City of Kenosha* to the claims of teachers against school boards, one commentator[18] concluded that boards could not be held liable under 42 U.S.C. § 1983.

> "The effect, if not the purpose of the Courts ruling in the *City of Kenosha* case, is to put a minimum $10,000.00 amount in controversy requirement on civil rights actions brought in the federal district courts against municipal bodies. Henceforth, a dismissed or non-renewed school teacher who asserts a constitutional claim for damages against a defendant public school district, its trustees or superintendent in their representative capacities, must plead and establish the $10,000.00 jurisdictional amount under 28 U.S.C. § 1331."

Similarly the Second Circuit in *Brandt* v. *Town of Milton*, 43 L.W. 2388 (2/14/75) noted the relationship between 28 U.S.C. § 1331 and 42 U.S.C. § 1983 and concluded that section 1331 "preserves the municipality's immunity as to actions not involving the minimum sum." Consequently close scrutiny of the amount in controversy is required before § 1331 jurisdiction attaches.

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[18] D. Griffis & J. Wilson, Constl. Rts. and Remedies in the Non-Renewal of a Public School Teacher's Employment Contract, 25 Baylor L. Rev. 539, 581 (1973).

Section 1331 of Title 28 of the United States Code grants federal jurisdiction over civil actions "whenever the matter in controversy exceeds the sum or value of $10,000 exclusive of interests and costs, and arises under the Constitution, laws, or treaties of the United States." Consequently Doyle is entitled to jurisdiction under § 1331 provided he can establish a substantial federal question and $10,000 in controversy. He claimed a violation of his First Amendment rights and requested reinstatement and $50,000 in damages, court costs and attorney's fees. Yet the record indicates that at no time under any circumstances did Doyle have a legitimate claim of $10,000.

Civil rights claims are capable of monetary evaluation under section 1331. *Giles* v. *Harris*, 189 U.S. 475 (1903); *Spock* v. *David*, 502 F.2d 953 (3rd Cir., 1974), cert. granted 95 S. Ct. 1556 (1975); *Brown* v. *Board of Education of City of Chicago*, 386 F. Supp. 110 (D.C. Ill., 1974). However unless the plaintiff determines his pecuniary interest in the right, jurisdiction does not attach. Thus in *Goldsmith* v. *Sutherland*, 426 F.2d 1395 (6th Cir., 1970), cert. denied 400 U.S. 960 (1970), the Sixth Circuit denied jurisdiction when the plaintiff alleged that he did not know the precise dollar value of his right to distribute leaflets on a military reservation. See also *Coleman* v. *Tennessee Valley Trades and Labor Council*, 396 F.Supp. 671 (D.C. Tenn., 1975). Doyle has made no effort to place a value on his right to call a radio station about the faculty dress code beyond his claim for compensatory and punitive damages. The First Amendment claim per se does not grant jurisdiction under 28 U.S.C. § 1331.

Section 1331 specifically excludes interest and costs in computing the amount in controversy. Under *Alyeska* v. *Wilderness Society*, 421 U.S. 240 (1975), the Court analyzed attorneys' fees to costs and refused to award them absent statutory authority. On the basis of *Alyeska*, the Sixth Circuit in the present case denied attorneys' fees. In *Sincock* v. *Obaro*, 320 F.Supp. 1098 (D. Del., 1973) and *Cupples Co. Mfg.* v. *Farmers and Merchants State Bank*, 380 F.2d 184 (5th Cir., 1968),

jurisdiction was refused for failure to have a sufficient amount in controversy after attorneys' fees were excluded. Attorneys' fees cannot form the basis for jurisdiction in the present suit.

The District Court in this case refused to award punitive damages. While punitive damages are included in determining the amount in controversy provided they are claimed in good faith, *Bell* v. *Preferred Life Assurance Society*, 320 U.S. 238 (1943), they may be ignored if merely made to establish jurisdiction. *Smith* v. *Greenhow*, 109 U.S. 669 (1884). Doyle did not have a $10,000.00 claim without the punitive damages. The refusal of the Supreme Court to grant monetary rewards against political bodies in *Monroe* v. *Pape*, 365 U.S. 167 (1961) and *City of Kenosha* v. *Bruno*, 412 U.S. 507 (1973) suggests that they would be inappropriate here. Jurisdiction in this case should not be premised on punitive damages.

The value of Doyle's claim to reinstatement was never as much as $10,000. Doyle held a non-tenured contract which expired in August, 1971. Although he was eligible for a tenured contract at the discretion of the school board, he was not entitled to it by state law, and no value can be assigned to something he held no legal interest in. *Board of Regents* v. *Roth*, 408 U.S. 564 (1972); *Perry* v. *Sindermann*, 408 U.S. 593 (1972).

At the time Doyle filed the suit, July 13, 1971, he – according to his own testimony (A. 172) – had already found other employment with the Miami Trace Local School District. While the general rule for determining the amount in controversy when the right to office is at issue is the amount of salary, *Columbian Ins. Co.* v. *Wheelright*, 20 U.S. 534 (1822), this rule need not apply when a teacher has secured other employment. See *Kochhar* v. *Auburn University*, 304 F.Supp. 565 (M.D. Ab. E.D., 1969). The most Doyle could anticipate in damages when he filed his suit was the difference between his anticipated salary at Mt. Healthy and his actual wages at Miami Trace. This amount was calculated by the

District Court to be a total of $5,158.00 for the *three years* it took the case to come to judgment.[19] *Ross* v. *Prentiss*, 44 U.S. (3 How.) 771 (1945), however, holds that the claim may not be aggregated over the years:

> The jurisdiction does not depend upon the amount of any contingent loss or damage which one of the parties may sustain by a decision against him, but in the amount in dispute between them.

At no time could Doyle in good faith claim as much as $10,000.00 in compensatory damages. In sum jurisdiction cannot be brought under 28 U.S.C. § 1331.

3. THE MT. HEALTHY CITY SCHOOL DISTRICT BOARD OF EDUCATION IS IMMUNE FROM SUIT UNDER THE SOVEREIGN IMMUNITY PROTECTION OF THE ELEVENTH AMENDMENT OF THE UNITED STATES CONSTITUTION.

a. The Mt. Healthy Board of Education is a governmental entity entitled to Eleventh Amendment immunity from money damages.

1. The Eleventh Amendment

The Eleventh Amendment of the United States Constitution provides that no state is subject to suit by a citizen of another state. The amendment was passed in response to *Chisholm* v. *Georgia*, 2 Dall. 419 (1793), which had held that states could be sued under the Judiciary Clause of the Constitution. Two days after *Chisholm* was announced a resolution was introduced in the Senate proposing a constitutional amend-

[19] Counsel for the Mt. Healthy Board of Education calculates the difference between what Doyle would have earned at Mt. Healthy and what he would earn at Miami Trace during the three years at only $501.33! The compensation figures are reprinted in the Appendix, at pp. 288, 290. (Jt. Ex. 5, 8, R. 4, 312.)

ment to overturn the ruling. Five years later that resolution became the Eleventh Amendment.

The doctrine of sovereign immunity embodied in the amendment has been extended to encompass suits by foreign powers against a state. *Monaco* v. *Mississippi*, 293 U.S. 313 (1934), by corporations against a state, *Smith* v. *Reeves*, 178 U.S. 446 (1900); in admiralty, *Ex Parte State of N.Y.*, 256 U.S. 490 (1921); by one state against another, *New Hampshire* v. *Louisiana*, 108 U.S. 76 (1883); and by citizens of the state against the state, *Hans* v. *Louisiana*, 134 U.S. 1 (1890). Accord: *Scheuer* v. *Rhodes*, 416 U.S. 232 (1974); see also *Williams* v. *U.S.*, 289 U.S. 553, 574-577 (1933).

The majority in *Hans* explained the policy when it concluded at page 21.

> It is not necessary that we should enter upon an examination of the reason or expediency of the rule which exempts a sovereign state from prosecution in a court of justice at the suit of individuals. This is fully discussed by writers on public law. It is enough for us to declare its existence. The legislative department of the state represents its policy and its will; and is called upon by the highest demands of natural and political law to preserve justice and judgment, and to hold inviolate the public obligations. Any departure from this rule, except for reasons most cogent, (of which the legislature, and not the courts, is the judge) never fails in the end to incur the odium of the world, and to bring lasting injury upon the state itself. But to deprive the legislature of the power of judging what the honor and safety of the state may require, even at the expense of a temporary failure to discharge the public debts, would be attended by greater evils than such failure can cause.

The doctrine of sovereign immunity has been sharply criticized by many;[20] it has been eroded by the concept of implied

[20] The arguments that state sovereignty is incompatible with natural justice and our federal system of government were advanced by the

waiver under certain circumstances when a state participates in federal programs.[21] Nevertheless the doctrine has been upheld and should be applied in the present case.

To permit suit here under 28 U.S.C. § 1343(3) or (4) would require construing the Civil Rights Act to create a cause of action against the state despite the explicit legislative rejection of that possibility which was confirmed by *Monroe* v. *Pape*, 365 U.S. 167, 188-190 (1961).

2. Ohio Law

The doctrine of sovereign immunity is recognized in Article 1, Section 16, of the Constitution of Ohio which reads:

> Suits may be brought against the State, in such courts and in such manner, as may be provided by law.

The provision is not self-executing; absent statutory waiver the State may not be sued. *Wolf* v. *Ohio State University Hospital*, 170 Ohio St. 49, 162 N.E.2d 475 (1959). The protection of sovereign immunity is shared under Ohio decisions by counties, *Schaeffer* v. *Board of Trustees*, 171 Ohio St. 228,

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majority in *Chisholm* v. *Georgia*, 2 Dall. 419 (1973), and rejected by the passage of the Eleventh Amendment. See also *Employees* v. *Missouri Public Health Dept.*, 411 U.S. 279 (1973) (Brennan, J. dissenting); *Larson* v. *Domestic and Foreign Corp.*, 337 U.S., 708-709 (1948) (Frankfurter, J., dissenting); *Krause* v. *State*, 31 OhioSt2d 132, 149, 285 N.E.2d 736, 746 (1972) (Brown, J. dissenting).

[21] *In Petty* v. *Tennessee-Missouri Bridge Commission*, 359 U.S. 275 (1959), the court held the state liable in tort on the basis of an interstate contract under the Compact Clause of the Constitution (Article I, Section 10) and the Jones Act, 46 U.S.C. § 688. In *Parden* v. *Terminal Ry. of Alabama*, 377 U.S. 184 (1964), the state was held liable under the Federal Employers' Liability Act, 45 U.S.C. § 51, et seq., when suit was brought by employees of a state owned railroad. In *Edelman* v. *Jordon*, 415 U.S. at 651, 672 (1974), which held a state not liable for retroactive payments to welfare recepients, *Petty* and *Parden* were distinguished because in F.E.L.A. and the Jones Act, Congress specifically designated states as potential defendants.

168 N.E.2d 547 (1960); state hospitals, *Mossman* v. *Donahey*, 46 Ohio St.2d 1, — N.E.2d — (1976); and state universities, *Thacker* v. *Board of Trustees, Ohio State University*, 35 Ohio St.2d 49, 298 N.E.2d 542 (1973); *Wolf* v. *Ohio State University Hospital*, supra; as well as by school districts, *Baird* v. *Hosmer*, 46 Ohio St. 2d 273 (5/26/76); *Board of Education* v. *Volk*, 72 Ohio St. 469, 74 N.E. 646 (1905).

The test developed in Ohio to determine whether an entity is entitled to sovereign immunity for tort actions was stated in *Board of Commissioners of Hamilton County* v. *Mighels*, 7 Ohio St. 109 (1857). There the Court distinguished between municipalities, which might be liable, from counties which were not:

> ". . . municipal corporations are called into existence, either at the direct solicitation or by the free consent of the people who compose them.
>
> Counties are local subdivisions of a State, created by the sovereign power of the State, of its own sovereign will, without the particular solicitation, consent, or concurrent action of the people who inhabit them. The former organization is asked for or at least assented to by the people it embraces; the latter is superimposed by a sovereign and paramount authority.
>
> A municipal corporation proper is created mainly for the interest, advantage, and convenience of the locality and its people; a county organization is created almost exclusively with a view to the policy of the State at large, . . ."

School districts, created by the State, to perform state functions fall within the latter category.

The Ohio Supreme Court considered the question of sovereign immunity under the Eleventh Amendment as recently as April, 1976, and concluded that a state hospital could not be sued under federal law without the consent of the state. *Mossman* v. *Donahey*, 46 Ohio St. 2d 1, — N.E.2d — (1976). While the doctrine is not favored when it has an

arbitrary effect, Ohio courts have consistently stated that if Ohio law is to be changed, it must be changed by the legislature. See e.g. *Wolf* v. *Ohio State University Hospital,* 170 Ohio St. 49, 53, 162 N.E.2d 475 (1959).

3. Federal Courts Apply State Law

The question as to whether a state agency, such as a local board of education, is entitled to sovereign immunity in federal court is decided by the federal courts within the context of state law. *Gordenstein* v. *University of Delaware,* 381 F.Supp. 718, 720 (Del. 1974). In Ohio, education is primarily the responsibility of the state. Ohio Constitution, Article 1, § 7 and Article 6. The General Assembly is charged with raising money to secure 'a thorough and efficient system of common schools throughout the State", and with organizing a public school system supported by state funds. Ohio Constitution, Article 6, Sections 2 and 3.

Local boards have only the powers delegated to them by the General Assembly. These powers include the corporate powers "of suing and being sued, contracting and being contracted with, acquiring, holding, possessing, and disposing of real and personal property, and taking and holding in trust for the use and benefit of such district any grant or devise of land and any donation or bequest of money or other personal property." Section 3313.17, Ohio Revised Code. Local boards also have authority to make rules and regulations for their own government, control their employees, students, and others on school grounds (Revised Code, Section 3313.20), and to manage and control the public schools in the district. (Revised Code, Section 3313.47).

At the same time the local district is subject to the general supervision of the state board which is responsible for forming policy and evaluation, administering the allocation and distribution of state and federal funds, and prescribing minimum standards for local elementary and secondary schools. Section 3301.07, Revised Code. Furthermore the General

Assembly has set out the procedure for hiring and terminating teachers and for granting tenure. Section 3319.11. When the Mt. Healthy Board made the decision challenged in this suit it was acting under this statute.

Public schools in Ohio are financed by local, state and federal funds. The local board is authorized to receive its share, along with the city and county, of unvoted taxes under the ten-mill limitation of sections 5705.02 and 5705.03, Revised Code; and to raise additional funds for authorized purposes through tax levies submitted to and approved by the electorate. Sections 5705.192 and 5705.194, Revised Code.

Ohio law does not authorize expenditures by school districts for money judgments in tort suits. A board of education has only such powers as the legislature has seen fit to confer upon it. *State ex rel. Locker* v. *Menning,* 95 Ohio St. 97, 115 N.E. 571 (1916); *State ex rel.* v. *Pierce,* 96 Ohio St. 44, 117 N.E. 6 (1917); *Schwing* v. *McClure,* 120 Ohio St. 335, 166 N.E. 230 (1929). As stated in *Board of Educ.* v. *Best,* 52 Ohio St. 138, 152 (1894):

> The authority of boards of education like that of municipal councils, is strictly limited. They both have only such powers as is expressly granted or clearly implied, and doubtful claims as to mode of exercising the powers vested in them are resolved against them.

Title 33, Ohio Revised Code, deals with the education laws of the state and Chapter 3313, Revised Code, applies specifically to boards of education; but neither contains any specific authorization for an expenditure to pay a tort liability judgment. Nor is there authority that such power may be implied.

The Ohio legislative scheme assumes that the board of education is immune from money damages. Section 3313.-203 of the Ohio Revised Code provides that boards may purchase insurance for the individual members of the board

of education "against liability on account of damages or injury to persons and property resulting from any act or omission of such member in his official capacity . . ." Similar authority is NOT granted to protect the School District Board of Education as a corporate entity.

The legislative assumption is supported by Ohio case law. Courts have repeatedly held school boards not liable in tort actions. *Baird* v. *Hosmer,* 46 Ohio St. 2d 273 (5/26/76); *Hall* v. *Board of Educ.,* 32 Ohio App. 2d 297 (1972); *Shaw* v. *Board of Educ.,* 17 Ohio Law Abs. 588 (1934); *Board of Educ.* v. *Volk,* 72 Ohio St. 469, 74 N.E. 646 (1905). The rationale for immunity in these cases is that the local board is not authorized to raise taxes or sell property to pay a tort claim, *Volk,* supra at 480.

This limitation is consistent with the Federal law which recognizes the pocketbook test in restricting liability. See *Edelman* v. *Jordon,* 415 U.S. 651 (1974); *Jordon* v. *Gilligan,* 500 F.2d 701 (6th Cir., 1974); *Skehan* v. *Board of Trustees, Bloomsburg State College,* 501 F.2d 31 (3rd Cir., 1974); *Frye* v. *Lukehard,* 364 F.Supp. 1379 (W.D. Va. 1973) and *Sincock* v. *Obaro,* 320 F.Supp. 1098 (Del. 1970). See also *Thonen* v. *Jenkins,* 517 F.2d 3 (4th Cir., 1975). When jurisdictions have permitted money damages against boards of education, the court has found that the school authority had the power and resources to pay the judgment. In *Gordenstein* v. *University of Delaware,* 381 F.Supp. 718 (1974), the court found that the University could raise the funds without further action by the state legislature, 381 F.Supp. at 721; and in *Fabrizio & Martin, Inc.* v. *Board of Educ. of Central School Dist. No. 2,* 290 F.Supp. 945 (N.Y. 1968), state law specifically authorized the school district to pay judgments against the school district by levying taxes. 290 F.Supp. at 948.

The only school cases in tort that we have found in Ohio where immunity has not been a bar to suit have involved equitable relief *when the public treasury is not directly at*

issue. *State ex rel. Board of Educ.* v. *Gibson,* 130 Ohio St. 318 (1935), involved the issue of whether the plaintiff board was immune from the statute of limitations and therefore in a position to collect tuition from non-residents even though the six year limitation had lapsed. *Akron Board of Educ.* v. *State Board of Educ.,* 490 F.2d 1285, (6th Cir.) cert. denied 417 U.S. 932 (1974), was to restrain the transfer of land to an adjoining district. *Wayman* v. *Board of Educ.,* 5 Ohio St. 2d 248, 215 N.E.2d 394 (1966), dealt with whether a Board could be ordered to stop maintaining a nuisance (a parking lot).

The facts in the present case do not argue for changing Ohio law. The board members as individuals were exonerated. The board as an entity acted pursuant to its statutory responsibility to notify Doyle, a non-tenured teacher, that his contract would not be renewed. The sovereign immunity defense should be recognized in this case.

b. The Board's immunity has not been waived.

The Ohio Constitution recognizes sovereign immunity for the state unless it is expressly waived. Article 1, Section 16. *State ex rel. Williams* v. *Glander,* 148 Ohio St. 188, 74 N.E.2d 82 (1947); *Palumbo* v. *Industrial Commission,* 140 Ohio St. 54, 42 N.E.2d 82 (1947); *Raudabaugh* v. *State,* 96 Ohio St. 513, 118 N.E. 102 (1917). The state legislature has not waived immunity for school boards. Sections 2743.01-2743.20, Revised Code, which waive state immunity and create a special court of claims for suits against the state, specifically exclude school districts from those governmental agencies to which the waiver applies.

Section 3313.17 of the Revised Code describes the powers of boards of education which include the capacity of "suing and being sued." The statute, however, has been construed narrowly; boards have not been held liable in tort claims.

Shaw v. *Board of Education*, 17 Ohio Law Abs. 588 (1934); *Hall* v. *Board of Educ.*, 32 Ohio App. 2d 297 (1972); *Board of Education* v. *Volk*, supra.

Brown v. *Board of Educ.*, 20 Ohio St. 2d 68, 253 N.E.2d 767 (1968) construed Section 3313.17 of the Revised Code to permit suit in a state court only in conjunction with other powers conferred by statute. Since school boards have specific powers to acquire real property, the board in *Brown* could be sued for adverse possession, but *Brown* does not extend section 3313.17 to authorize suit for a tort. 20 Ohio St. 2d 68, 72-73 (1969). See also *Wayman* v. *Board of Education*, 248 Ohio St. 248 (1966). Similarly in *Wolf* v. *Ohio State University Hospital*, 170 Ohio St. 49, 162 N.E.2d 475 (1959), the court refused to construe a grant of power to sue and be sued as a waiver of the immunity secured by Article 1, Section 16, of the Ohio Constitution.[22]

Doyle's claim is grounded in tort law for he seeks redress for an alleged infringement on his constitutional rights. Doyle can not bring the suit for breach of contract because he was non-tenured and his two year limited contract expired. He had no right to a continuing contract under state law.

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[22] In the following states, courts have construed a general power to sue or be sued to *not* affect the tort immunity of school districts: *Tuck* v. *County Board of Educ.*, 22 Ala. 177, 131 So 436 (1930); *Tapscott* v. *Page*, 17 Alaska 507 (1958); *Wallace* v. *Laurel County Board of Educ.*, 287 Ky. 454, 153 S.W.2d 915 (1941); *Weddle* v. *Board of County School Com'rs.*, 94 Md. 334, 51 A. 289 (1902); *Daniels* v. *Board of Educ.*, 191 Mich. 339, 158 N.W. 23 (1916) *Todd* v. *University of Missouri*, 347 Mo. 460, 147, S.W.2d 1063 (1941); *Perkins* v. *Trask*, 95 Mont. 1, 23 P.2d 982 (1933); *Anderson* v. *Board of Educ.*, 49 N.D. 181, 190 N.W. 807 (1922); *Consolidated School Dist.* v. *Wright*, 128 Okla. 193, 261 P. 953 (1927); *Antin* v. *Union High School Dist.*, 130 OR 461, 280 P. 644 (1929); *Shubert* v. *School Dist.*, 169 S.C. 191, 168 S.E. 391 (1933); *Morris* v. *University of Texas*, 348 S.W.2d 644, (Tex. 1961), rev'd on other grounds 163 Tex. 130, 352 S.W.2d 947, *cert. denied* 371 U.S. 953, *Krutili* v. *Board of Educ.*, 99 W.Va. 466, 129 S.E. 486 (1925); *Holzworth* v. *State*, 238 Wis. 63, 298 N.W. 168 (1941).

Finally it should be noted that courts have repeatedly held that neither the Fourteenth Amendment, Title 28 of the United States Code, nor the Civil Rights Act constitutes an effective waiver of sovereign immunity. See *Corbean* v. *Xenia City Board of Educ.*, 366 F.2d 480 (6th Cir., 1966); *Cuiska* v. *City of Mansfield*, 250 F.2d 700 (6th Cir., 1957); *Thatcher* v. *Board of Trustees of Ohio State University*, 58 Ohio Op. 45, 277 N.E.2d 818 (1971); *St. Louis University* v. *Blue Cross Hospital Service Inc.*, 393 F.Supp. 367 (D.C. Mo. 1975).

THE CONCLUSION

The relationship between a board of education and a teacher is essentially a matter of state concern and state law. *Perry* v. *Sindermann*, 408 U.S. 593 (1972) (Burger, C. J. concurring at 603). Federal jurisdiction should not attach to such situations unless there is clear violation of the teacher's constitutional rights. Since the record here indicates that the Board's decision was not in retaliation for Doyle's exercise of a First Amendment right, the Board's decision should be affirmed.

Furthermore, the Sixth Circuit erred in awarding back pay and reinstatement against the Board. The Mt. Healthy Board of Education is immune from suit under Ohio law and the Eleventh Amendment. Since the General Assembly has not waived that immunity, the Board cannot be sued under 42 U.S.C. § 1983, 28 U.S.C. §§ 1343(3) and (4). Doyle never had a good faith claim of $10,000 to bring suit under 28 U.S.C. § 1331.

To hold the Board liable for not renewing Doyle's contract when no wrongdoing is attributable to the individual members is nonsense for the Board can only act through its members. The Board is entrusted with the duty to operate an efficient and effective school system, which includes the responsibility of developing a strong faculty. If this Court compels the

Mt. Healthy Board of Education to retain Doyle for the rest of his teaching life because its original decision, although proper, was contaminated by an alleged infringement of First Amendment rights, then the capacity of local school districts to educate the district's youth will be severely restricted.

Respectfully submitted,

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ADDENDUM

ARTICLE I: CONSTITUTION OF OHIO

§ 7 [Rights of conscience; education; necessity of religion and knowledge.]

All men have a natural and indefeasible right to worship Almighty God according to the dictates of their own conscience. No person shall be compelled to attend, erect, or support any place of worship, or maintain any form of worship, against his consent; and no preference shall be given, by law, to any religious society; nor shall any interference with the rights of conscience be permitted. No religious test shall be required, as a qualification for office, nor shall any person be incompetent to be a witness on account of his religious belief; but nothing herein shall be construed to dispense with oaths and affirmations. Religion, morality, and knowledge, however, being essential to good government, it shall be the duty of the general assembly to pass suitable laws to protect every religious denomination in the peaceable enjoyment of its own mode of public worship, and to encourage schools and the means of instruction. (See Const 1802, Art VIII, §§ 3, 25.)

§ 16 [Redress in courts.]

All courts shall be open, and every person, for an injury done him in his land, goods, person, or reputation, shall have remedy by due course of law, and shall have justice administered without denial or delay.

[Suits against the state.] Suits may be brought against the state, in such courts and in such manner, as may be provided by law. (As amended September 3, 1912.)

ARTICLE VI: EDUCATION

§ 2 School funds.

The general assembly shall make such provisions, by tax-

ation, or otherwise, as, with the income arising from the school trust fund, will secure a thorough and efficient system of common schools throughout the state; but no religious or other sect, or sects, shall ever have any exclusive right to, or control of, any part of the school funds of this state.

§ 3 Public school system; boards of education.

Provision shall be made by law for the organization, administration and control of the public school system of the state supported by public funds: provided, that each school district embraced wholly or in part within any city shall have the power by referendum vote to determine for itself the number of members and the organization of the district board of education, and provision shall be made by law for the exercise of this power by such school districts. (Adopted September 3, 1912.)

STATUTES

OHIO REVISED CODE

2743.01 Definitions

As used in Chapter 2743. of the Revised Code:

(A) "State" means the state of Ohio, including, without limitation, it departments, boards, offices, commissions, agencies, institutions, and other instrumentalities. It does not include political subdivisions.

(B) "Political subdivisions" means municipal corporations, townships, villages, counties, school districts, and all other bodies corporate and politic responsible for governmental activities only in geographic areas smaller than that of the state to which the sovereign immunity of the state attaches.

• • •

2743.02 Waiver of state's immunity; claims reduced by collateral recovery

(A) The state hereby waives its immunity from liability and consents to be sued, and have its liability determined, in the court of claims in this chapter in accordance with the same rules of law applicable to suits between private parties, subject to the limitations set forth in this chapter. To the extent that the state has previously consented to be sued, this chapter has no applicability.

(B) Awards against the state shall be reduced by the aggregate of insurance proceeds, disability award. or other collateral recovery by the claimant.

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TITLE 33: EDUCATION – LIBRARIES

§ 3301.07 Powers of state board.

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The state board of education shall exercise under the acts of the legislature general supervision of the system of public education in the state of Ohio. In addition to the powers otherwise imposed on the state board under the provisions of law, such board shall have the following powers:

(A) It shall exercise policy forming, planning and evaluative functions for the public school of the state, and for adult education, except as otherwise provided by law.

(B) It shall exercise leadership in the improvement of public education in Ohio, and shall administer the educational policies of this state relating to public schools, and relating to instruction and instructional material, building and equipment, transportation of pupils, administrative responsibilities of school officials and personnel, finance and organization of school districts and territory. Consultative and advisory services in such matters shall be provided by the board to school districts of this state.

(C) It shall administer and supervise the allocation and distribution of all state and federal funds for public school education under the provisions of law, and may prescribe such systems of accounting as are necessary and proper to this function. It may require county auditors and treasurers, boards of education, clerks of such boards, teachers, and other school officers and employees, or other public officers or employees, to file with it such reports as it may prescribe relating to such funds, or to the management and condition of such funds.

(D) It shall formulate and prescribe minimum standards to be applied to all elementary and high schools in this state for the purpose of requiring a general education of high quality. Such standards shall provide adequately for: a curriculum sufficient to meet the needs of pupils in every community; the certification of teachers, administrators and other professional personnel and their assignment according to training and qualifications; efficient and effective instructional materials and equipment, including library facilities; the proper organization, administration and supervision of each school, including regulations for preparing all necessary records and reports and the preparation of a statement of policies and objectives for each school; buildings, grounds, health and sanitary facilities and services; admission of pupils, and such requirements for their promotion from grade to grade as will assure that they are capable and prepared for the level of study to which they are certified; requirements for graduation; and such other factors as the board finds necessary.

In the formulation and administration of such standards for nonpublic schools the board shall also consider the particular needs, methods and objectives of said schools, provided they do not conflict with provision of a general education of a high quality and provided that regular procedures shall be followed for promotion from grade to grade of pupils who have met the educational requirements prescribed.

(E) It shall formulate and prescribe minimum standards for driver education courses conducted at high schools in the state. In the formulation of standards for driver education courses, it shall call upon the director of highway safety for advice and assistance.

(F) It shall prepare and submit annually to the governor and members of the general assembly a report on the status, needs and major problems of the public schools of the state of Ohio, with recommendations for necessary legislative action.

(G) It shall prepare and submit to the director of budget and management the biennial budgetary requests of the state board of education, for its agencies and for the public schools of the state.

(H) It shall cooperate with federal, state and local agencies concerned with the health and welfare of children and youth of the state of Ohio.

(I) It shall require such reports from school districts, school officers, and employees as are necessary and desirable. The superintendent and clerk of a school district shall certify as to the accuracy of all reports required by law or state board or state department of education regulations to be submitted by the district and which contain information necessary for calculation of state funding. Any superintendent who knowingly falsifies such report shall be subject to certificate revocation pursuant to section 3319.31 of the Revised Code. The state board of education shall adopt rules and regulations governing the purchasing and leasing of data processing services and equipment for all local, exempted village, city, county, and joint vocational school district.

(J) It may adopt such rules and regulations as are necessary for the carrying out of any function imposed on it by

law, and may provide such regulations as are necessary for its government and the government of its employees, and may delegate to the superintendent of public instruction the management and administration of any function imposed on it by law.

(K) It may provide for the appointment of board members to serve on temporary committees established by the board for such purposes as are necessary. Permanent or standing committees shall not be created.

* * *

3313.17 (4834). Corporate powers of the board.

The board of education of each school district shall be a body politic and corporate, and, as such, capable of suing and being sued, contracting and being contracted with, acquiring, holding, possessing, and disposing of real and personal property, and taking and holding in trust for the use and benefit of such district, any grant or devise of land and any donation or bequest of money or other personal property.

* * *

§ 3313.20 Rules and regulations; employee attendance at professional meetings, expenses.

The board of education shall make such rules and regulations as are necessary for its government and the government of its employees, pupils of its schools, and all other persons entering upon its school grounds or premises. Rules and regulations regarding entry of persons other than students, staff, and faculty upon school grounds or premises shall be posted conspicuously at or near the entrance to such grounds or premises, or near the perimeter of such grounds or premises if there are no formal entrances, and at the main entrance to each school building. Any employee may receive compensa-

tion and expenses for days on which he is excused, in accordance with the policy statement of the board, by the superintendent of such board or by a responsible administrative official designated by the superintendent for the purpose of attending professional meetings as defined by the board policy, and the board may provide and pay the salary of a substitute for such days. The expenses thus incurred by an employee shall be paid by the board from the appropriate fund of the school district or the county board fund provided that statements of expenses are furnished in accordance with the policy statement of the board.

Each city, local, and exempted village school district shall adopt a written policy governing the attendance of employees at professional meetings.

* * *

3313.203 Liability insurance for board of education members

The board of education of any school district may purchase from an insurance company licensed to do business in this state, a policy or policies of insurance insuring members of boards of education against liability on account of damages or injury to persons and property resulting from any act or omission of such member in his official capacity as a member of the board of education or resulting solely out of his membership thereon. Whenever the board considers it necessary to procure such insurance, it shall adopt a resolution setting forth the amount of the insurance to be purchased, the necessity thereof, and a statement of the estimated premium as quoted in writing by not less than two insurance companies if more than one company offers such insurance for sale to the board. Upon the adoption of such resolution, the board

may purchase insurance frm the insurance company submitting the lowest and best quotation. The premiums for such insurance shall be paid out of the general fund.

* * *

[CONTROL OF SCHOOLS; SPECIAL SCHOOLS]

§ 3313.47 Management and control of schools vested in board of education. (GC § 4836)

Each city, exempted village, or local board of education shall have the management and control of all of the public schools of whatever name or character in its respective district. If the board has adopted an annual appropriation resolution, it may, by general resolution, authorize the superintendent or other officer to appoint janitors, superintendents of buildings, and such other employees as are provided for in such annual appropriation resolution.

* * *

3319.11 Continuing service status and contract; limited contract; failure of board or superintendent to act.

Teachers eligible for continuing service status in any school district shall be those teachers qualified as to certification, who within the last five years have taught for at least three years in the district, and those teachers who, having attained continuing contract status elsewhere, have served two years in the district, but the board of education, upon the recommendation of the superintendent of schools, may at the time of employment or at any time within such two-year period, declare any of the latter teachers eligible.

Upon the recommendation of the superintendent that a teacher eligible for continuing service status be re-employed, a continuing contract shall be entered into between the board and such teacher unless the board by a three-fourths vote of

its full membership rejects the recommendation of the superintendent. The superintendent may recommend re-employment of such teacher, if continuing service status has not previously been attained elsewhere, under a limited contract for not to exceed two years, provided that written notice of the intention to make such recommendation has been given to the teacher with reasons directed at the professional improvement of the teacher on or before the thirtieth day of April, and provided that written notice from the board of education of its action on the superintendent's recommendation has been given to the teacher on or before the thirtieth day of April, but upon subsequent reemployment only a continuing contract may be entered into. If the board of education does not give such teacher written notice of its action on the superintendent's recommendation of a limited contract for not to exceed two years before the thirtieth day of April, such teacher is deemed reemployed under a continuing contract at the same salary plus any increment provided by the salary schedule. Such teacher is presumed to have accepted employment under such continuing contract unless he notifies the board in writing to the contrary on or before the first day of June, and a continuing contract shall be executed accordingly.

A teacher eligible for continuing contract status employed under an additional limited contract for not to exceed two years pursuant to written notice from the superintendent of his intention to make such recommendation, is, at the expiration of such limited contract, deemed reemployed under a continuing contract at the same salary plus any increment granted by the salary schedule, unless the employing board, acting on the superintendent's recommendation as to whether or not the teacher should be reemployed, gives such teacher written notice of its intention not to reemploy him on or before the thirtieth day of April. Such teacher is presumed to have accepted employment under such continuing contract unless he notifies the board in writing to the contrary on or

before the first day of June, and a continuing contract shall be executed accordingly.

A limited contract may be entered into by each board with each teacher who has not been in the employ of the board for at least three years and shall be entered into, regardless of length of previous employment, with each teacher employed by the board who holds a provisional or temporary certificate.

Any teacher employed under a limited contract, and not eligible to be considered for a continuing contract, is, at the expiration of such limited contract, deemed reemployed under the provisions of this section at the same salary plus any increment provided by the salary schedule unless the employing board, acting on the superintendent's recommendation as to whether or not the teacher should be reemployed, gives such teacher written notice of its intention not to reemploy him on or before the thirtieth day of April. Such teacher is presumed to have accepted such employment unless he notifies the board in writing to the contrary on or before the first day of June, and a written contract for the succeeding school year shall be executed accordingly. The failure of the parties to execute a written contract shall not void the automatic reemployment of such teacher.

The failure of a superintendent of schools to make a recommendation to the board of education under any of the conditions set forth in this section, or the failure of the board of education to give such teacher a written notice pursuant to this section shall not prejudice or prevent a teacher from being deemed reemployed under either a limited or continuing contract as the case may be under the provisions of this section. (129 v 1206. Eff. 10-17-61. 128 v 123)

§ 5705.02 "Ten-mill limitation." (GC § 5625-2)

The aggregate amount of taxes that may be levied on any taxable property in any subdivision or other taxing unit shall not in any one year exceed ten mills on each dollar of tax valuation of such subdivision or other taxing unit, except for

taxes specifically authorized to be levied in excess thereof. The limitation provided by this section shall be known as the "ten-mill limitation," and wherever said term is used in the Revised Code, it refers to and includes both the limitation imposed by this section and the limitation imposed by Section 2 of Article XII, Ohio Constitution.

§ 5705.03 Authorization to levy taxes; collection. (GC § 5625-3)

The taxing authority of each subdivision may levy taxes annually, subject to the limitations of sections 5705.01 to 5705.47, inclusive, of the Revised Code, on the real and personal property within the subdivision for the purpose of paying the current operating expenses of the subdivision and acquiring or constructing permanent improvements. The taxing authority of each subdivision and taxing unit shall, subject to the limitations of such sections, levy such taxes annually as are necessary to pay the interest and sinking fund on and retire at maturity the bonds, notes, and certificates of indebtedness of such subdivision and taxing unit, including levies in anticipation of which the subdivision or taxing unit has incurred indebtedness. All taxes levied on property shall be extended on the tax duplicate by the county auditor of the county in which the property is located, and shall be collected by the county treasurer of such county in the same manner and under the same laws, rules, and regulations as are prescribed for the assessment and collection of county taxes. The proceeds of any tax levied by or for any subdivision when received by its fiscal officer shall be deposited in its treasury to the credit of the appropriate fund.

§ 5705.192 Resolution relative to tax levy in excess of ten-mill limitation for school purposes.

The board of education of a city, exempted village, or local school district at any time in any year, by vote of

two-thirds of all members of said board, may declare by resolution and certify such resolution to the board of elections not less than sixty days before the election upon which it will be voted, that the amount of taxes which may be raised within the ten-mill limitation will be insufficient to provide for the necessary requirements of the school district and that it is necessary to levy a tax in excess of such limitation for the purpose of providing for current expenses of the school district.

Such resolution shall specify the amount of increase in rate which it is necessary to levy, the portion of the increase in rate, if any, proposed to be levied in order to qualify for the distribution of school funds pursuant to the provisions of Chapter 3317, of the Revised Code, and the portion of the increased rate, if any, in excess of the amount necessary to qualify for the distribution of funds pursuant to the provisions of Chapter 3317. of the Revised Code, and whether or not there shall be a levy upon the duplicate of the current year. Such resolution shall not include a levy on the current tax list and duplicate unless such election is to be held at or prior to the first Tuesday after the first Monday in November of the current tax year.

The board of education, in such resolution shall specify that the total increased rate proposed to be levied, shall be for a continuing period of time, not withstanding the fact that the total millage for current expenses being currently levied by the district is at least the minimum millage rate required by section 3317.01 of the Revised Code. Such levies shall be in effect until such time as the rate may be decreased by an amount equal to or less than the amount of such voted increase, by a majority vote of the electors of the school district approving such decrease pursuant to the provisions of section 5705.261 [5705.26.1] of the Revised Code, or pursuant to the provisions of section 5705.31, 5705.331 [5705.33.1], or 5713.11 of the Revised Code; or such portion may be so decreased for a period of not to exceed one year, and from year to year, by a majority vote on the part of the board of education.

Such resolution shall go into immediate effect upon its passage and no publication of the same shall be necessary other than that provided for in the notice of election.

The powers granted to a board of education by this section are supplemental to and not in derogation of the powers otherwise granted to a board of education under Chapter 5705. of the Revised Code.

§ 5705.194 Resolution to submit emergency school levy.

The board of education of any school district may at any time declare by resolution that the revenue which will be raised by all tax levies which the district is authorized to impose, when combined with state and federal revenues, will be insufficient to provide for the emergency requirements of the school district or to prevent temporary or permanent closing of one or more schools within the district, and that it is therefore necessary to levy an additional tax in excess of the ten-mill limitation. Such resolution shall be confined to a single purpose and shall specify the purpose thereof, the amount of money it is necessary to raise for that purpose for each year the millage is to be imposed, and the number of years in which the millage is to be in effect, which may include a levy upon the current year's tax list. The number of years may be any number not exceeding five. The resolution shall specify the date of holding the election which shall not be earlier than sixty-five days after the adoption and certification of such resolution to the county auditor nor later than one hundred twenty days thereafter. A resolution adopted pursuant to this section may be submitted at a general election, a primary election, or a special election on the day specified in the resolution. A resolution adopted under this section shall not be submitted at more than one special election in any calendar year. Such resolution shall not include a levy on the current tax list and duplicate unless such election is to be held at or prior to the first Tuesday after the first

Monday in November of the current tax year. Said resolution shall go into immediate effect upon its passage and no publication of the same shall be necessary other than that provided for in the notice of election. A copy of such resolution shall immediately after its passing be certified to the county auditor of the proper county. Section 5705.195 [5705.19.5] of the Revised Code shall govern the arrangements for the submission of such question and other matters concerning such election. No special election shall be held during the ten days preceding or subsequent to Easter Sunday, Thansksgiving day, or Christmas day in any year. Publication of notice of such election shall be made in one or more newspapers of general circulation in the county once a week for three consecutive weeks. If a majority of the electors voting on the question so submitted in an election vote in favor of such levy, the board of education of the school district may forthwith make the additional levy necessary to raise the amount specified in the resolution for the purpose stated in the resolution. Such tax levy shall be included in the next annual tax budget that is certified to the county budget commission. After the approval of the levy and prior to the time when the first tax collection from such levy can be made, the board of education may anticipate a fraction of the proceeds of such levy and issue anticipation notes in an amount not exceeding the total estimated proceeds of the levy to be collected during the first year of the levy.

Such notes shall be sold as provided in section 133.01 to 133.65 of the Revised Code. If such anticipation notes are issued, they shall mature serially and in substantially equal amounts during each year over a period not to exceed five years; and if such notes are issued, the amount necessary to pay the interest and principal as they mature shall be deemed appropriated for such purposes from such levy, and appropriations from such levy by the board of education of the school district shall be limited each year to the balance available in excess of such amount.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

No. 75-1278

MT. HEALTHY CITY SCHOOL DISTRICT
BOARD OF EDUCATION,
Petitioner,

vs.

FRED DOYLE,
Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

SUPPLEMENTAL AUTHORITIES OF PETITIONER

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ARGUMENT

1. **When a nontenured school teacher's contract is not renewed and the teacher seeks reinstatement and backpay under the Civil Rights Act, 42 U.S.C. § 1983 and when the court finds that the defendant school board is not a "person" within the meaning of 42 U.S.C. § 1983 and therefore the court lacks jurisdiction under 28 U.S.C.**

§ 1343, then the federal court should not exercise federal question jurisdiction under 28 U.S.C. § 1331 over the complaint.

Doyle filed suit under 28 U.S.C. § 1343 and the Civil Rights Act, 42 U.S.C. § 1983. The district court erroneously held the school board liable as a § 1983 "person". (See Judge Hogan's statement at page 30 in Appendix where he says "* * * the case is here as a § 1331 case, as well as a § 1983 one." Doyle now argues that even if this error were rectified the board would still be liable under 28 U.S.C. § 1331, federal question jurisdiction. However, this claim fails not only because Doyle's complaint lacks a sufficient amount in controversy[1] but also because plaintiff cannot "bootstrap" jurisdiction over the school district under 28 U.S.C. § 1331.

Each and every one of Doyle's authorities for the proposition that "reinstatement is a necessary part of the remedy where a teacher . . . has been terminated from employment for the exercise of rights protected by the First Amendment" (cited in Respondent's Brief, p. 41) is a case premised on § 1983 jurisdiction. Consequently, since the remedies Doyle seeks are directly dependent upon § 1983, his claim is dependent on § 1983 jurisdiction. Since Doyle is not entitled to damages against the school district under § 1983, assertion of jurisdiction under 28 U.S.C. § 1331 would be meaningless because he would have no remedy. The First Amendment is not self-executing. *Weathers* v. *West Yuma County School District,* 387 F.Supp. 552, 556 (1974), aff'd 530 F.2d 1335 (10th Cir. 1976). The Court should deny 28 U.S.C. § 1331 jurisdiction.

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[1] See Petitioner's Brief, pp. 21-24 and Petitioner's Reply Brief; see also *Ramsey* v. *Hopkins,* 447 F.2d 128 (1971), holding damages to be backpay minus earnings.

2. In order to be entitled to reappointment and tenure a non-renewed, non-tenured teacher must prove that the paramount reason for his non-renewal was based on the exercise of his first amendment rights.

The lower courts are not unanimous on the degree to which non-renewal of a teacher is justified when there is a first amendment claim in the case. In the Tenth Circuit the test is whether the constitutional activity was the predominant or paramount reason. *Bertot* v. *School District No. 1, Albany County,* 522 F.2d 1171 (10th Cir. 1975), a case squarely on point, illustrates the standard. These two suits were consolidated. Both involved the claims of teachers that the nonrenewal of their contracts was, at least in part, in retaliation for the exercise of first amendment rights. In the first suit the principal prepared a written statement explaining the reasons for the non-renewal of Martha Sweeney which were: poor attitude, problems with students, and lack of judgment. Under lack of judgment one example was the fact that she had publicly taken a position contrary to the school district concerning a school dress code and had appeared on the radio to discuss it. Ms. Sweeney claimed that she was terminated in retaliation for this incident. The court, however, did not permit this claim to obscure its judgment. There were other reasons sufficient to warrant the non-renewal. The Board's decision was affirmed.

In the second suit, by contrast, the court found that the teacher's involvement with an underground newspaper was the predominant reason for her non-renewal. Since her first amendment activities with the paper did not violate the balancing test required by *Pickering* v. *Board of Educ.,*

391 U.S. 563 (1968), the court concluded that she was entitled to judgment.[2]

In *Adams* v. *Campbell County School District*, 511 F.2d 1242 (10th Cir. 1975), the court of appeals upheld the trial court's finding that there was substantial evidence of permissible reasons to support the board's non-renewal decision despite first amendment claims. In Doyle's case, the trial court found that there were sufficient permissible reasons to warrant non-renewal (A. 27, 28) but erroneously concluded that the impermissible reason controlled. That error should be corrected and the standard recognized by the Tenth Circuit applied. See also *Franklin* v. *Atkins*, 409 F.Supp. 439 (D.Colo. 1976).

Respectfully submitted,

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[2] The court remanded the case to consider the eleventh amendment immunity claim of the school district.

IN THE

Supreme Court of the United States

October Term, 1975

No. 75-1278

MT. HEALTHY CITY SCHOOL DISTRICT
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Petitioner,

v.

FRED DOYLE,

Respondent.

On Writ of Certiorari to the
United States Court of Appeals
for the Sixth Circuit

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BRIEF FOR RESPONDENT

COUNTER-STATEMENT OF THE CASE

Facts

Fred Doyle began teaching in the Mt. Healthy City School District in 1966. He was then 24 years old, had a bachelor of science degree, and had been certified by the State of Ohio as a high school teacher. App. 17.

Over the next five years, Doyle taught business courses in the high school, and led a number of extra-curricular school

activities. His employment had been pursuant to one-year contracts during his first three teaching years, and a two-year contract covering the 1969-71 school year. App. 18. While teaching, Doyle also earned an M.A. degree in 1968. *Id.*

Under Ohio law, had Doyle's employment been renewed for the 1971-72 school year he would automatically have achieved "continuing contract status"—Ohio's equivalent of tenure—and would have been assured of continued employment in future years absent cause for his removal. App. 18; O.R.C. §§3319.11, 3319.08, 3319.16. In the spring of 1971, however, Doyle was notified by the Board of Education (hereinafter "Board" or "School Board") that his employment would not be renewed for 1971-72. App. 18.

Throughout his five years in the school system, Doyle's teaching performance had been excellent, a fact known to the Board when it voted not to renew his employment. App. 202, 208, 219, 244-245. The principal had advised the Board "that Fred was a fine teacher"; that "he did a fine job in the classroom on the subject matter. He was very knowledgeable. He individualized instruction to the kids, to the young people . . ." App. 41. His "rapport in the classroom was fine." App. 42. In Doyle's final year of teaching, as the Board knew, the principal had enumerated, as Doyle's "excellent characteristics," "consistent and accurate in fulfilling teaching duties and extra duties," "relates well with students," and "individualizes instruction." App. 94. Doyle had received merit awards and other commendations in prior years for his excellence as a teacher, App. 18, 117-118, and his evaluations had all been in the satisfactory-to-superior range, App. 92-93, 174-175.

In addition, Doyle had been singularly successful in leading school extra-curricular activities. He founded a business club, a branch of Future Business Leaders of America, which involved students in business-related ventures including public service and fund-raising activities; Doyle devoted 300 hours per year, without pay, to sponsorship of this club. App. 19, 113-115, 202-203. He also became faculty manager of the school newspaper, "and turned its operation from red to black." App. 19, 115-116.

When Doyle received notification that the Board had decided not to extend him a continuing contract, he requested a statement of the reasons for the Board's action. In response to this request, the superintendent of schools drafted a letter of explanation; but before sending the letter to Doyle the superintendent consulted with the Board as to the reasons to be set forth in the letter. App. 247-248. The letter, in the form given to Doyle, was as follows (App. 289):

"Dear Mr. Doyle:

Continuing contracts normally are awarded to those staff members who have not only displayed professional teaching ability, but who also have shown through their words and actions that they truly support the philosophy and goals of the Mt. Healthy School System. The following reasons were submitted to the Board prior to the consideration for the continuing contract:

I. You have shown a notable lack of tact in handling professional matters which leaves much doubt as to your sincerity in establishing good school relationships.

A. You assumed the responsibility to notify W. S. A. I. Radio Station in regards to the suggestion of the Board of Education that teachers establish an appropriate dress code for professional people. This raised much concern not only within this community, but also in neighboring communities.

B. You used obscene gestures to correct students in a situation in the cafeteria causing considerable concern among those students present.

Sincerely yours,

Rex Ralph
Superintendent"

The first of the two reasons given for not continuing Doyle's employment—the "WSAI incident"—arose out of Doyle's role as a collective bargaining representative of the teachers. Doyle had been elected president of the Teacher's Association for the 1969-70 school year, and served as a member of its executive committee for the 1970-71 year. Due largely to Doyle's efforts, the Association was transformed from a discussion group into an effective collective bargaining representative. To achieve this transformation, Doyle lobbied for and secured the removal of all principals and administrators from membership in the Association; conducted wage surveys establishing that the school district paid less than neighboring districts; and was the chief spokesman for the teachers in the first round of collective bargaining negotiations. App. 19-21, 119-139, 143-149, 165.

One of the issues which had not been resolved in those negotiations, but which was a continuing source of controversy between teachers and administrators, was whether a "dress code" should be imposed by the administration upon the teachers. The administration had received some "feedback" from members of the public who were unhappy about the informality of teachers' dress. As a "public relations" matter, the administration wanted to accommodate these concerns, for bond issues affecting the schools' operation had to be approved by public vote. The teachers, on the other hand, had been insistent that the question of adoption of a dress code was one in which they had a substantial

interest, and thus one which should not be imposed upon them unilaterally. The administration had agreed that there would not be unilateral imposition of a dress code. App. 87, 170-171, 175-176, 199-200.

On February 8, 1971, the high school principal issued a "teacher memo," prepared at the School Board's suggestion (App. 289), announcing "decisions" which had been "made on a school-wide basis in hopes that it will help the image of the professional staff and Mt. Healthy City School District in general." App. 296. The memo directed teachers to dress conservatively. Women were instructed, *inter alia*, that pantsuits will be "considered inappropriate," and men were instructed to wear neckties and dress shirts. App. 295-296.

This memo was placed in each teacher's mailbox. When Doyle received it, he was upset that an issue which he had understood would be the subject of joint teacher-administration resolution had been unilaterally resolved by the administration. App. 171. Doyle had become friendly with a disc jockey at WSAI, a Cincinnati radio station, in the course of Doyle's sponsorship of a business club effort to raise money for the WSAI Heart Fund. App. 171. Doyle called his friend and read to him the principal's dress code memo. *Id.* The station broadcast a news item announcing adoption of the dress code. The content of the broadcast does not appear in the record. The only witness who described the broadcast, the principal, had not heard it himself, but offered this hearsay description (App. 53):

> "My understanding was that there had been statements made over WSAI about the fact that the administration of the Mt. Healthy City Schools felt that the teachers needed to dress good. I did not hear the broadcast."

The principal derived an impression, from comments he heard about the broadcast, that it had criticized "the

fact that we as administrators felt a need to talk to teachers about dress and dress code." App. 55. Although it is undisputed that Doyle's call to WSAI did not make the "controversy or problem in the system with respect to dress code . . . any worse," App. 90, Doyle's publication of the dress code troubled the administration. The principal was "concerned" by "this being put out to the media." App. 66. He testified, "I was much concerned by public reaction and any backlash . . . that could come from something being misinterpreted or being given to the public over news media in a certain way with a certain tone to it." App. 66.

The principal met with Doyle soon after learning of the broadcast. Knowing that Doyle had a friend at WSAI, he asked whether Doyle knew how the station had learned of the dress code. Doyle told him that he (Doyle) had reported it to his friend. The principal told Doyle that, while he had a right to call the station, he should first have talked to the principal about his concern. Doyle agreed that it would have been better had he talked to the principal first. App. 88-89.

When the Board of Education met the following month to decide whether Doyle should receive a continuing contract, Doyle's role in the WSAI incident was an "area of concern." App. 52-53. Some Board members "had heard the broadcast and were concerned about it." App. 187. The principal told the Board that Doyle's role in this matter was "a problem." App. 66. As the superintendent of schools testified, the WSAI incident "was in fact one of the reasons for non-renewal." App. 248. Board members were of the view that Doyle's calling the station was "not what a professional teacher does," App. 199. The letter to Doyle explaining his non-renewal stated that his disclosure of the dress code had "raised much concern not only within this community, but also in neighboring communities." App. 289.

The other reason given in the letter for not awarding

Doyle a continuing contract was the "gesture incident." App. 289. Doyle was responsible during the lunch period for maintaining discipline among students in the school cafeteria. One afternoon in November, 1970, four female students were misbehaving. When Doyle sought to quiet them down, they became insolent. In response to a comment by one of them, Doyle made a gesture employing his index and pinky fingers. App. 48, 167-168, 257-258. Viewers of University of Texas football games will recognize this gesture as the school's rally cry, "Hook-em [Long] Horns." In Ohio, the gesture has a somewhat different connotation also related to bulls. App. 24. One of the girls responded with a one-finger gesture which we believe has a uniform meaning throughout the nation. *Id.*

Aware that his gesture had been an over-reaction, Doyle reported the incident to the assistant principal and suggested that the latter convene a meeting at which Doyle could apologize to the girls. At this meeting, Doyle explained the necessity for maintaining order in the cafeteria, but apologized for the gesture. The apology was immediately accepted by three of the girls. The fourth continued to act disrespectfully, and was reprimanded by the assistant principal. At the time, the assistant principal thought the meeting had gone well, and that the incident would have no repercussions. No issue was made of the incident, Doyle was not reprimanded, and no formal record was entered in his file. App. 168-170, 257-260. However, when several months later the question of Doyle's renewal was before the Board, the principal told the Board of the incident, and at the Board's request the assistant principal prepared a memo describing the incident. App. 264, 297. Notwithstanding the incident, the principal advised the Board that Doyle "relates well to students." App 108.

Proceedings Below

Following receipt of the letter explaining the reasons for

his non-renewal, Doyle instituted the present lawsuit. Named as defendants were the Board of Education, its members in their individual and official capacities, and the school superintendent in his individual and official capacities. Jurisdiction was alleged under both 28 U.S.C. §1331 and 28 U.S.C. §1343.[1] The complaint alleged that the failure to renew Doyle's teaching contract was motivated by his exercise of rights protected by the First and Fourteenth Amendment. The complaint sought an order reinstating Doyle to his teaching position, together with "damages" in the sum of $50,000, attorney's fees, and such other and additional relief as the court might deem appropriate. App. 6-9.

Defendants' answer denied that the non-renewal was motivated by Doyle's protected activities. App. 10-12. Thereafter, defendants submitted a "pre-trial statement" reciting that *"there are no contested issues of law in the instant case.* The Plaintiffs must sustain their burden of proof by showing that the real reason that they were not re-employed was in retaliation and as punishment for exercise of their constitutionally protected rights." App. 14 (emphasis added).[2]

A trial to the court ensued at which the above facts were adduced. In addition, the principal testified that he had reported a few other incidents involving Doyle to the Board in connection with its consideration of Doyle's renewal. App. 56-60. These incidents are described in the district court's opinion at App. 21-23. Four of the five Board members testified. All claimed that the decision to

[1] The complaint contained a typographical error, referring to 28 U.S.C. §1331 as "28 U.S.C. §1931." App. 6. As the district court understood, however, "it claimed, and the claim here is well founded, that this court has jurisdiction under 28 U.S.C. §1331." App. 17.

[2] Defendants' statement referred to "plaintiffs", in the plural, because the separate complaints of three teachers had been consolidated for trial. On the eve of trial, the other two teachers withdrew their complaints, and the trial thus involved only Doyle.

deny Doyle renewal was premised on lack of tact and immaturity; none specifically identified these other incidents, or any combination of them, as having contributed to that assessment. App. 18; 182-206; 206-218, 267; 219-227; 268; 233-235, 237-239.[3] Two Board members testified that the superintendent's recommendation that Doyle be denied renewal had not been based *solely* upon the WSAI call. App. 230, 237. No Board member claimed that the WSAI call had not been a factor in the decision, nor did any assert that the decision would have been the same even without the WSAI call.

Doyle testified about his experiences following non-renewal. He had sought teaching positions in other school districts within commuting distance of Cincinnati, which had been his lifetime home, but could not obtain any. The best he could do was a position as a guidance counselor, rather than a classroom teacher, in Washington Court House, Ohio; the distance necessitated his moving from Cincinnati. During the three years between his non-renewal and the trial, he had earned $5,150 less in his new job than he would have earned had he been granted a continuing contract by defendants. App. 26, 112-113, 172-173. (His job in Mt. Healthy, had his employment been renewed, would have paid him more than $10,000 each year. App. 288.)

Following the trial, the court issued findings and conclusions. On the merits, the critical portion of the court's opinion appeared in its first two conclusions. App. 28:

> 1) If a non-permissible reason, e.g., exercise of First Amendment rights, played a substantial part in the decision not to renew—even in the face of other permis-

[3] All told, the process of receiving the reports of the administrators, hearing the superintendent's recommendation, and debating and deciding whether to renew Doyle's employment, had taken the Board less than half an hour. App. 203.

sible grounds—the decision may not stand. See *Shehan* v. *Board,* —— F.2d —— (3rd Cir. 1974) and cases therein cited; *Lusk* v. *Estes,* 361 F.Supp, 653 (Texas, 1973).

2) A non-permissible reason did play a substantial part. That is clear from the letter of the Superintendent immediately following the Board's decision, which stated two reasons—the one, the conversation with the radio station clearly protected by the First Amendment. A court may not engage in any limitation of First Amendment rights based on "tact" . . .

The court awarded Doyle reinstatement with backpay, the reinstatement to be with "tenure on the same basis as if he had been employed by the defendant Board during the interim." App. 28-29. Backpay was set at $5,158, which represents the difference between what Doyle actually earned in the three years between non-renewal and the reinstatement order and what he would have earned had his employment been renewed initially. App. 26-27, 31. Attorneys fees were awarded against the Board in the amount of $6,343.16 pursuant to the "private attorney general" theory which was then deemed available by the Sixth Circuit even absent express statutory mandate. *Hill* v. *Franklin County Board of Education,* 390 F.2d 583 (6th Cir. 1968). App. 29.

The court entered its award against the Board as an entity, concluding that it had authority to do so under its Section 1331 jurisdiction. The court thus found it unnecessary to resolve the "Monroe-Kenosha problem"—whether the Board was a "person" within the meaning of 42 U.S.C. § 1983—upon which plaintiff's alternative claim of jurisdiction under 28 U.S.C. § 1343 turned.[4] The court also found it unnecessary to address any possible Eleventh Amendment defense "since the parties seem to concede

[4] See n.6, *infra.*

that O.R.C. § 3313.17 (the board of each district shall be a body politic and corporate, and, as such, capable of suing and being sued, etc.) provides the necessary waiver." App. 30.[5] The court dismissed the action against all other defendants. App. 29-30.

The Board appealed. In its opening brief to the Court of Appeals the Board for the first time asserted an Eleventh Amendment defense. In its reply brief to the Court of Appeals the Board for the first time challenged the existence of the requisite "amount in controversy" for § 1331 jurisdiction.

The Sixth Circuit (Judges Weick, Peck and Miller) affirmed in all respects but one: it set aside the award of attorneys fees as inconsistent with "the intervening decision in *Alyeska* v. *Wilderness Society.*" App. 35. With respect to the merits, the court concluded "that substantial evidence in the record supports the finding of the district court to the effect that appellant's action in refusing to renew appellee's contract was motivated at least in part by his action in informing a local radio station of an 'appropriate dress code' suggested for teachers, and that the district court did not err in concluding that the refusal to renew the contract was based upon a constitutionally impermissible reason." App. 34-35. The court's opinion did not mention the Eleventh Amendment or jurisdictional amount issues, but its disposition necessarily constituted a rejection of the Board's claims with respect to those issues.

SUMMARY OF ARGUMENT

I

The requisite amount in controversy existed to confer jurisdiction under 28 U.S.C. §1331. The test is whether

[5] No party had adverted to the Eleventh Amendment at any time in the district court. The court apparently drew the "concession" from the parties' silence.

the value to plaintiff of the legal and equitable relief he seeks, measured as of the date his complaint is filed, exceeds $10,000. Where plaintiff alleges that his claim is worth more than $10,000 the jurisdictional amount requirement is satisfied, unless the court finds that the allegation is in bad faith, or it appears "to a legal certainty that the claim is really for less than the jurisdictional amount." *Horton* v. *Liberty Mutual Ins. Co.*, 376 U.S. 348, 353 (1961).

The matter in controversy in the instant case included, *inter alia*, plaintiff's quest (successful below) for a court order awarding him tenure on a job paying more than $10,000 *each year*. Throughout this nation's history, the rule has been that the value of a suit in which the plaintiff seeks to hold or obtain a job is measured by the salary of the job over the term for which he will be entitled to hold it. It is immaterial that circumstances can be imagined in which the remedy will be shown, with hindsight, not to have been worth the jurisdictional amount: e.g., if plaintiff quits, dies or is fired before earning the jurisdictional amount, or if plaintiff mitigates his losses below that amount by securing other employment. "Events occurring subsequent to the institution of suit which reduce the amount recoverable below the statutory limit do not oust jurisdiction." *St. Paul Indemnity Co.* v. *Red Cab Co.*, 303 U.S. 283, 289-290 (1938). It cannot seriously be contended that the "present value" of tenure to plaintiff, at the time he filed this lawsuit, did not exceed $10,000.

II

The courts below correctly ruled that the Board had denied Doyle a continuing contract for a constitutionally impermissible reason, and properly awarded him reinstatement with a continuing contract.

A. The Board was not permitted to rely upon Doyle's

exercise of First Amendment rights in deciding whether to award him a continuing contract. *Perry* v. *Sindermann*, 408 U.S. 593, 597-598 (1972). It is undisputed that the Board relied upon Doyle's phone call to WSAI in deciding not to extend him a continuing contract. That call, which brought to public attention an action taken by the Board on a matter which was then of considerable public interest in the community, was protected by the First Amendment. There was here no "detriment to the interests of the schools" which outweighed Doyle's First Amendment interests. *Pickering* v. *Board of Education*, 391 U.S. 563, 571 (1968). Neither the Board's concern for its "public relations image", nor interests in confidentiality, good working relationships, and having complaints processed through internal channels, tip the scales in this case against protection of Doyle's right to make the call.

That the Board characterized the phone call as exhibiting a "lack of tact" cannot change the constitutional analysis. This is not a case in which a teacher exercised his right to speak in so patently offensive or tactless a manner as to cast doubt upon his capacities as a teacher. Here, Doyle did no more than read the dress code memo to the radio station. His "lack of tact" was not the manner of his speaking, but that he chose to speak at all. In this context, "lack of tact" is but a label for punishing speech itself.

B. A decision predicated in part upon an employee's protected speech violates the First Amendment, as the courts of appeals uniformly have held. Whether a teacher's employment is terminated wholly or partially in retaliation for the exercise of First Amendment rights, a penalty is exacted for that exercise, and future exercise of those rights by that teacher or others may be chilled.

Petitioner's argument that under this rule "a teacher might participate in unpopular conduct just to insure em-

ployment" misapprehends the meaning of the rule. The rule provides no protection to a teacher who is terminated for permissible reasons, regardless of whether the teacher has engaged in protected activity. Nor is the rule invoked by the mere fact that governmental decision makers are aware of, and view with distaste, a public employee's involvement in protected activities, so long as that involvement does not play a part in their decision. The rule has effect only where the employee can show that the government *relied upon* the impermissible reason in reaching its decision.

The rule does not depend upon the substantiality of the reliance. But even if it did, the district court's express finding that the phone call played "a substantial part" in the Board's decision is amply supported by the record.

C. The remedy awarded by the district court and upheld by the court of appeals properly restores to Doyle what he was unconstitutionally denied: a continuing contract to teach.

Courts have an obligation to fashion a remedy which "make[s] good the wrong done." *Bell* v. *Hood,* 327 U.S. 678, 684 (1946). A wrong of the type here is not made good if the victim remains in a less advantageous position because of his exercise of First Amendment rights. Where First Amendment rights are concerned a make-whole remedy is particularly important to avoid a "chilling effect" on the willingness of the victim and others to engage in protected conduct. Consistent with these principles, the federal courts of appeals uniformly have held that reinstatement is a necessary part of the remedy where a teacher, or other public employee, has been terminated for the exercise of rights protected by the First Amendment.

This case provides no occasion for an exception to this uniform result. When a public employee shows that he was terminated from his job in part because of his exercise of

rights protected by the First Amendment, he is presumptively entitled to the remedy of reinstatement. That the public employer's decision was based in part on permissible as well as impermissible factors is pertinent only if it could be established that the employer would have made the same decision even without the impermissible factor. It is the employer's burden to prove that his decision would have been the same: "No reason appears . . . why the victim rather than the perpetrator of the illegal act should bear the burden of proof on this issue." *Franks* v. *Bowman Transportation Co.,* —— U.S. ——, 44 LW 4356, 4363, n.32 (1976). As with analogous cases dealing with the question who is entitled to a "make-whole" remedy where racial discrimination in employment has been proved, the employer's burden can be met only by "clear and convincing" evidence.

Petitioner has failed to meet this burden. At trial, none of petitioner's witnesses denied that the phone call to the radio station played a part in the Board's decision; none of petitioner's witnesses testified that the Board would have reached the same result if it had not considered that call. Petitioner presented no showing which would defeat Doyle's presumptive entitlement to reinstatement with a continuing contract. That remedy was therefore properly awarded by the courts below.

III

The backpay award against the Board is not barred by the Eleventh Amendment. That Amendment immunizes the "State" from retroactive monetary liability, and if Ohio had chosen to run the public schools through the state government it could not be held monetarily accountable for its wrongs. But Ohio, like most states, has opted for local control and management of its schools through locally elected boards of education which function as autonomous political and corporate entities. Cf. *Milliken* v. *Bradley,* 418 U.S. 717 (1974). That option has critical

significance to the application of the Eleventh Amendment, for here it is not the state government, but rather a local school board, which has committed the wrong, and plaintiff seeks recovery from that board, not from the state treasury. Ohio school boards have fiscal independence, with general taxing and bond issuing powers, and the backpay award in this case cannot impact upon the state treasury. It is hornbook law that "a suit against a county, a municipality, or other lesser governmental unit is not regarded as a suit against a state within the meaning of the Eleventh Amendment", Hart and Wechsler, *The Federal Courts and the Federal System,* 690 (2d Ed). This Court has repeatedly so held.

ARGUMENT

I. THE REQUISITE AMOUNT IN CONTROVERSY EXISTED TO CONFER JURISDICTION UNDER 28 U.S.C. § 1331.

In his complaint, plaintiff asserted jurisdiction on two grounds: a cause of action directly under the Fourteenth Amendment, with jurisdiction predicated upon 28 U.S.C. §1331; and a cause of action under the Civil Rights Act of 1871, 42 U.S.C. §1983, with jurisdiction predicated upon 28 U.S.C. §§1343(3) and (4). The district court ruled that it had jurisdiction of this action against the School Board under 28 U.S.C. §1331, and thus found it unnecessary to state "any conclusion on the possible Monroe-Kenosha problem in this case."[6]

[6] The court's reference was to *Monroe* v. *Pape,* 365 U.S. 167 (1961) and *City of Kenosha* v. *Bruno,* 412 U.S. 507 (1973), in which this Court held that municipalities are not "persons" within the meaning of § 1983. The "problem" which the district court found it unnecessary to decide is whether school boards should be equated with municipalities for § 1983 purposes. Cf. *Mayor* v. *Educational Equality League,* 415 U.S. 605, 612 n. 11 (1974). The courts of appeals have recognized themselves to be in conflict on the question. *Gray* v. *Union County Intermediate Education District,* 520 F.2d 803, 805 n. 1 (9th Cir. 1975); *Thomas* v. *Ward,* 529 F.2d 916, 920-921 n. 2 (4th Cir. 1975). The Seventh Circuit has held that the outcome turns upon the particular status of the school board under state law, *Cf. Aurora Education Association* v. *Board of Education,* 490 F.2d 431, 435 (7th Cir. 1973), cert. denied 416 U.S. 985 (1974) *with Hostrop* v. *Board of Junior College Dist. No. 515,* 523 F.2d 569, 576-577 n. 2 (7th Cir. 1975). The Second Circuit has adopted a similar approach, *cf. Forman* v. *Community Services, Inc.,* 500 F.2d 1246, 1255 (2nd Cir. 1974) *with Monell* v. *Dept. of Social Services,* 532 F.2d 259, 263 (2nd Cir. 1976). See also *Keckeisen* v. *Independent School District 612,* 509 F.2d 1062, 1065 (8th Cir. 1975), cert. denied 423 U.S. 833 (1975); Note, *Damage Remedies Against Municipalities for Constitutional Violations,* 89 Harv. L. Rev. 922, 924-925, n. 15 (1976).

Petitioner acknowledges that "Doyle is entitled to jurisdiction under §1331 provided he can establish a substantial federal question and $10,000 in controversy." (Brief, page 22). Petitioner's only argument against §1331 jurisdiction is that "plaintiff never had a good faith claim that could under any circumstances amount to $10,000." *Id.* page 9; see also page 22. We show herein that this contention lacks merit, and that the courts below properly concluded that the requisite jurisdictional amount was present here.[7]

[7] This Court, of course, may inquire into its jurisdiction *sua sponte,* on grounds not advanced by the parties. The question whether a cause of action for damages "exists directly under the Fourteenth Amendment irrespective of the implementing civil rights legislation," *Aldinger* v. *Howard,* 44 L.W. 4988, 4989, n. 3 (1976), is one of great current interest and importance, has been addressed recently in innumerable lower court opinions and is the subject of a comprehensive article published earlier this year. Note, *Damage Remedies Against Municipalities for Constitutional Violations,* 89 Harv. L. Rev. 922 (1976). That question is not, however, a *jurisdictional* question. Plaintiff's *assertion* that a cause of action exists directly under the Fourteenth Amendment is sufficient to confer jurisdiction under 28 U.S.C. §1331, regardless of whether the assertion ultimately proves correct, so long as it is not "wholly insubstantial and frivolous." *Bell* v. *Hood,* 327 U.S. 678, 682-683 (1964). That plaintiff's assertion is substantial is apparent not only from the persuasive analysis in the Harvard Note, *supra,* but also from the fact that the vast majority of the lower courts which have addressed the question have concluded that such a cause of action exists. *Hanna* v. *Drobnick,* 514 F.2d 393, 398 (6th Cir. 1975); *Skehan* v. *Board of Trustees of Bloomsburg State College,* 501 F.2d 31, 44 (3rd Cir. 1974), vacated

In determining whether "the matter in controversy exceeds the sum or value of $10,000," 28 U.S.C. §1331(a), the critical question is the value *to the plaintiff* of the relief he seeks. *Packard* v. *Banton,* 264 U.S. 140, 142 (1924); *Weinberger* v. *Weisenfeld,* 420 U.S. 636, 642 n. 10 (1975); 1 Moore's Federal Practice (2d Ed. 1976), par. 0.91[1], p. 827, and cases cited therein. The plaintiff's assertion in his complaint that his claim is worth more than $10,000 is determinative, unless the court finds that the assertion is in bad faith, or it appears "to a legal certainty that the claim is really for less than the jurisdictional amount." *Horton* v. *Liberty Mutual Ins. Co.,* 376 U.S. 348, 353, (1961). Accord: *St. Paul Indemnity Co.* v. *Red Cab Co.,* 303 U.S. 283, 289 (1938); *Weinberger, supra.*

Where the complaint seeks equitable relief which, if granted, would forestall the plaintiff's suffering monetary injury exceeding $10,000, the jurisdictional requirement is met; it is not necessary that plaintiff wait until he has actually suffered the injury. The "want of a sufficient amount of damage having been sustained to give the federal court jurisdiction will not defeat the [jurisdiction], as the removal of the obstruction is the matter of controversy, and the value of the object must govern." *Mississippi & Missouri R.R.*

on other grounds, 421 U.S. 983 (1975); *Roane* v. *Callisburg Independent School District,* 511 F.2d 633, 635, n. 1 (5th Cir. 1975); *Hostrop* v. *Board of Junior College Dist. No. 515,* 523 F.2d 569, 577 (7th Cir. 1975); *Fitzgerald* v. *Porter Memorial Hospital,* 523 F.2d 716, 718-719, n. 7 (7th Cir. 1975) (Stevens, J.); *Cox* v. *Stanton,* 529 F.2d 47, 50-51 (4th Cir. 1975). See also *Brault* v. *Town of Milton,* 527 F.2d 730 (2nd Cir. 1975), *vacated on other grounds, id.* at 736, 738 (2nd Cir. 1975) (en banc); cases cited in Harvard Note, *supra,* 89 Harv. L. Rev. at 928-929, notes 40-46; and *Panzarella* v. *Boyle,* 406 F. Supp. 787, 791-793 (D.R.I. 1975) and cases cited therein.

Petitioner did not seek review of the decisions below insofar as they held, "on the merits" (*Bell* v. *Hood, supra,* 327 U.S. at 682), that plaintiff had a cause of action directly under the Fourteenth Amendment. Accordingly that issue is not before the Court in this case.

Co. v. *Ward,* 67 U.S. 485, 492 (1863). Accord: *Packard, supra; Weinberger, supra.*

In the present case the complaint alleged that defendants had denied plaintiff a continuing contract because of his First Amendment activity. Plaintiff claimed as relief (and obtained below) reinstatement with a continuing contract. That relief invests plaintiff with an expectancy of continued employment for the remainder of his working life absent "good and just cause,"[8] on a job paying more than $10,000 *each year* (App. 288). It cannot seriously be suggested that the "present value" of that relief to plaintiff, at the time he filed his lawsuit, did not exceed $10,000.

Throughout this nation's history, the rule has been that the value of a suit in which the plaintiff seeks to hold or obtain a job is measured by the salary of the job over the term for which he will be entitled to hold it. *The Columbian Ins. Co.* v. *Wheelwright,* 20 U.S. 534 (1822); *U.S.* v. *Addison,* 63 U.S. 174, 184 (1860); *Smith* v. *Whitney,* 116 U.S. 167, 173 (1886); *Smith* v. *Adams,* 130 U.S. 167 (1889); *Chaudoin* v. *Atkinson,* 494 F.2d 1323, 1328 (3rd Cir. 1974); *Nord* v. *Griffin,* 86 F.2d 481 (7th Cir. 1936), cert. denied 300 U.S. 673 (1937); *Friedman* v. *International Association of Machinists,* 220 F.2d 808 (D.C. Cir. 1955), cert. denied 350 U.S. 824 (1955); *White* v. *Bloomberg,* 345 F. Supp. 133, 141 (D. Md. 1972); *Patterson* v. *City of Chester,* 389 F. Supp. 1093, 1095-96 (E.D. Pa. 1975).

In any such suit, of course, the possibility exists that the remedy, if granted, would prove with hindsight not to have

[8] Under Ohio law, "a continuing contract is a contract which shall remain in effect until the teacher resigns, elects to retire, or is retired pursuant to § 3307.37 of the Revised Code [mandatory retirement at age 70], or until it is terminated or suspended. . ." O.R.C. § 3319.08. The grounds upon which such a contract can be terminated or suspended are specified in O.R.C. § 3319.16: "for gross inefficiency or immorality; for willful and persistent violations of reasonable regulations of the board of education; or for other good and just cause."

benefited the plaintiff in the jurisdictionally required amount. The plaintiff might quit or die before earning the requisite amount; or he might engage in acts of misconduct triggering his termination before he had earned that amount. But these possibilities, however real, are "immaterial"; it is enough that there is no legal certainty that the value will prove less than the jurisdictional amount. *Aetna Casualty Co.* v. *Flowers,* 330 U.S. 464, 468 (1947); *Brotherhood of Locomotive Firemen* v. *Pinkston,* 293 U.S. 96, 100 (1934); *Thompson* v. *Thompson,* 226 U.S. 551, 559-560 (1913).[9] In *Thompson,* for example, anticipated monthly payments pursuant to a maintenance award over a period of years sufficed to establish the jurisdictional amount, even though the award was "subject to be modified from time to time or even cut off entirely, in the event of a change in the circumstances of the parties" before the jurisdictional amount was recovered. 226 U.S. 559.

Similarly, in any employment case the possibility exists that the plaintiff might be able to secure alternate employment which, over the term of employment at issue, might mitigate his losses below the jurisdictional amount. But that possibility can not defeat jurisdiction, for the claim is valued at the time the suit is filed, and "[e]vents occurring subsequent to the institution of suit which reduce the amount recoverable below the statutory limit do not oust jurisdiction." *St. Paul Indemnity, supra,* 303 U.S. at 289-290; 1 Moore's, *supra,* par. 0.91[3], p. 850, and cases cited in n. 1 thereat. Since, in the instant case, it could not be known to a legal certainty that plaintiff would be able to secure alternate employment throughout his career keeping his cumulative injury at $10,000 or less,[10] the jurisdictional amount was present.

[9] See also *Weinberger, supra,* where it was possible (if the plaintiff opted to work continuously, and was able to secure employment) that the relief sought would yield him no monetary benefit.

To be sure, plaintiff had already obtained an alternate contract for the 1971-72 school year at the time he brought suit, in an amount only about $2,000 less than he would have earned with Mt. Healthy (App. 172, 288, 290), and arguably that sufficed to establish that his injury *in that year* would not exceed $10,000.[11] But plaintiff's alternate employment was pursuant to a one-year contract, and he did not have the assurance of continued employment thereafter which his continuing contract with Mt. Healthy would have provided him. The possibility thus existed that in the very next year he might suffer a monetary loss exceeding $10,000. And even if he were able continuously to obtain alternate employment, it was virtually inevitable that his cumulative loss would exceed $10,000, for his salary at the new school district was less than that which he would receive in Mt. Healthy (App. 288, 290). Thus, by the end of the third year, the difference had already mounted to $5,158. Assuming the pay differential has continued at the same rate, it will have exceeded $10,000 by the time of this Court's decision, and this despite the fact that plaintiff has obtained and held alternate employment throughout the period of litigation. The district court computed backpay only to the date of judgment, expecting that plaintiff would then be reinstated and suffer no additional loss. But the Board's appeals have delayed plaintiff's reinstatement another three

[10] Indeed, as we show shortly, it is probable that plaintiff has *already* suffered an injury exceeding $10,000 and he will be entitled to recomputation of his backpay upon remand to such an amount.

[11] We say "arguably," because plaintiff had not yet received the money, nor had he performed the services for which the money was promised. Circumstances can be envisioned, e.g. a financial emergency in his new school district requiring a lay-off of some teachers, which would have resulted in his not receiving the contractually promised work and/or salary.

years, and plaintiff will be entitled to recomputation of his backpay award to an amount which probably will exceed $10,000.

The School Board argues that in determining whether plaintiff's claim met the jurisdictional amount no value can be assigned to his quest for a remedy awarding him a continuing contract. "Although he was eligible for a tenured contract at the discretion of the school board, he was not entitled to it by state law, and no value can be assigned to something he held no legal interest in" (Brief, p. 23). But this misconstrues both the nature of plaintiff's claim and the standards which the courts apply in determining existence of the jurisdictional amount. Plaintiff did not contend that he had a "property" interest entitling him to a continuing contract. But he contended that he was entitled to a judicial order requiring that he be granted a continuing contract because the reason motivating the Board's withholding of such a contract was his exercise of his First Amendment rights. The "matter in controversy", i.e. the relief claimed by plaintiff, included a continuing contract, and the value of that contract is properly included in determining the jurisdictional amount. Plaintiff's quest surely was not frivolous: it was upheld by both courts below, and as we show *infra*, they were right in upholding it. But whatever the ultimate legal outcome, it could not defeat jurisdiction. That a plaintiff ultimately loses on the merits, and thus does not *recover* the jurisdictional amount, is irrelevant, *St. Paul Indemnity, supra,* 303 U.S. at 289, so long as it was not a "legal certainty," at the time the complaint was filed, that he would lose. *Ibid.*[12]

[12] We do not mean to suggest that plaintiff's quest for a continuing contract was *indispensable* to his entitlement to claim relief beyond the first year, and thus to his right to have the value of subsequent years' employment considered in valuing his claim. In many First Amendment and procedural due process cases, courts have granted backpay and/or reinstatement beyond one year, even though the plaintiff had no "property" right to employment beyond that year. See, e.g., *Abbott* v. *Thetford,* 529 F.2d 695, 701 (5th Cir. 1976); *Sterzing* v. *Fort Bend Ind. Sch. Dist.,* 496 F.2d 92, 93 (5th Cir. 1974); *Janetta* v. *Cole,* 493 F.2d 1334 (4th Cir. 1974); *Gieringer* v. *Center School District No. 58,* 477 F.2d 1164, 1167 (8th Cir. 1973), cert. denied 414 U.S. 832 (1973); *Wellner* v. *Minnesota State Junior College Board,* 487 F.2d 153, 157 (8th Cir. 1973) (order denying petition for rehearing); *Cooley* v. *Board of Education,* 453 F.2d 282, 287 (8th Cir. 1972); *Ramsey* v. *Hopkins,* 447 F.2d 128 (5th Cir. 1971); *Johnson* v. *Branch,* 364 F.2d 177, 182 (4th Cir. 1966) (en banc), cert. denied 385 U.S. 1003 (1967); *Zimmerer* v. *Spencer,* 485 F.2d 176, 179 (5th Cir. 1973) (dictum). Cf. *Vitarelli* v. *Seaton,* 359 U.S. 535, 545, 546 (1959); *Greene* v. *United States,* 376 U.S. 149 (1964).

Because plaintiff's employment interest here involves more than $10,000, it is unnecessary to address the question, upon which the lower courts are in conflict, of what value to assign to vindication of the constitutional right *itself*. See Harvard Note, *supra,* 89 Harv. L. Rev. at 960 n. 189, and cases cited therein.

II. THE COURTS BELOW CORRECTLY RULED THAT THE BOARD HAD DENIED DOYLE A CONTINUING CONTRACT FOR A CONSTITUTIONALLY INPERMISSIBLE REASON, AND PROPERLY AWARDED HIM REINSTATEMENT WITH A CONTINUING CONTRACT.

The Board argues that it did not violate Doyle's constitutional rights, and that even if it did, reinstatement with a continuing contract was an improper remedy (Brief, pp. 10-16). As we understand the Board's argument, it makes essentially three points:

First, it was entitled to rely upon Doyle's phone call to WSAI in deciding whether to grant him renewal (and the continuing contract which, by operation of Ohio law, would automatically accompany renewal).

Second, even if reliance upon the phone call was improper, there was no First Amendment violation because the phone call constituted only "part"—and not a "substantial part"—of the reason for its decision.

Third, even if the First Amendment was violated, rein-

statement with a continuing contract was an improper remedy.

We treat these points in turn.

A. The Board Was Not Entitled to Rely Upon Doyle's Phone Call to WSAI in Deciding Whether To Grant Him Renewal.

Doyle had no "property" right to continued employment. The Board was not obliged, under Ohio law, to have "cause" in order to decide that he should not be renewed and thereby awarded a continuing contract. Nevertheless, in deciding whether to confer these benefits upon Doyle, the Board was not permitted to rely upon Doyle's exercise of his First Amendment rights. *Perry* v. *Sindermann,* 408 U.S. 593, 597-598 (1972):

> "For at least a quarter-century, this Court has made clear that even though a person has no 'right' to a valuable governmental benefit and even though the government may deny him the benefit for any number of reasons, there are some reasons upon which the government may not rely. It may not deny a benefit to a person on a basis that infringes his constitutionally protected interests—especially, his interest in freedom of speech. For if the government could deny a benefit to a person because of his constitutionally protected speech or associations, his exercise of those freedoms would in effect be penalized and inhibited. This would allow the government to 'produce a result which [it] could not command directly.' *Speiser* v. *Randall,* 357 U.S. 513, 526. Such interference with constitutional rights is impermissible.
>
> We have applied this general principle to denials of tax exemptions, . . . unemployment benefits, . . . and welfare payments, . . . But, most often we have applied the principle to denials of public employment. . . We have applied the principle regardless of the public

> employee's contractual or other claim to a job. Compare *Pickering* v. *Board of Education,* [391 U.S. 563], with *Shelton* v. *Tucker,* [364 U.S. 479].
>
> Thus, the respondent's lack of a contractual or tenure 'right' to re-employment for the 1969-1970 academic year is immaterial to his free speech claim. Indeed, twice before, this Court has specifically held that the nonrenewal of a nontenured public school teacher's one-year contract may not be predicated on his exercise of First and Fourteenth Amendment rights. *Shelton* v. *Tucker,* supra; *Keyishian* v. *Board of Regents,* [385 U.S. 589]. We reaffirm those holdings here."

It is undisputed that the Board relied upon Doyle's phone call to WSAI in deciding not to extend him a continuing contract. The letter explaining the denial advised Doyle that "continuing contracts normally are awarded to those staff members who have not only displayed professional teaching ability, but who also have shown through their words and actions that they truly support the philosophy and goals of the Mt. Healthy school system," App. 289, and that he had fallen short of this standard in two respects, the first of which was:

> "You assumed the responsibility to notify WSAI radio station in regards to the suggestion of the Board of Education that teachers establish an appropriate dress code for professional people. This raised much concern not only within this community, but also in neighboring communities." (*Id.*)

Again, at trial, the school superintendent acknowledged that this was "in fact one of the reasons" for the Board's decision. App. 248.

In determining whether the Board's reliance upon this incident was constitutionally impermissible, it is important

to recall the facts precisely. Upon receiving the dress code memorandum, which he believed had been promulgated contrary to a prior promise that any dress code would be collectively negotiated, Doyle telephoned a friend at the radio station and read the memorandum to him, apparently *in haec verba*. There is no suggestion that he criticized the dress code, or its promulgators, or that he expressed any point of view concerning it. He simply brought to public attention an action taken by the School Board on a matter which was then of considerable public interest in the community. He had not been told, and the memorandum did not suggest, that its contents were to be kept confidential by the teachers who received it.

The radio station reported the adoption of the dress code. It is possible—although the record evidence is third-hand—that the broadcast was critical of "the fact that administrators felt a need to talk to teachers about dress and the dress code." App. 55. It is undisputed that Doyle's reporting of the dress code to the radio station, and the ensuing radio broadcast, had absolutely no adverse effects within the school system. App. 90.

The broadcast stirred *public* interest and discussion about the propriety of imposition of the dress code, however, App. 289, and it is precisely this which the members of the Board and their appointed administrators found disturbing. Their disenchantment with Doyle's conduct was essentially a disenchantment with the core values which the First Amendment was designed to protect. These officials simply did not like public examination of their actions, particularly by the "news media," which they considered unreliable. As the principal explained, "I was much concerned about public reaction and any backlash . . . that could come from something being misinterpreted or being given to the public over news media in a certain way with a certain tone to it." (App. 66). The superintendent and the Board were "concerned" about the broadcast (App. 52-53, 187); it

was "a problem" (App. 66); Doyle's call to the radio station was "not what a professional teacher does." (App. 199). The letter to Doyle explaining his non-renewal emphasized that his call had stimulated "much concern not only within this community, but also in neighboring communities." App. 289.

It could hardly be disputed that an ordinary citizen, possessed of the memorandum, would have had a First Amendment right to disclose its contents to a local radio station. And the premise "that teachers may constitutionally be compelled to relinquish the First Amendment rights they would otherwise enjoy as citizens to comment on matters of public interest in connection with the operation of the public schools in which they work . . . has been unequivocally rejected in numerous prior decisions of this Court." *Pickering* v. *Board of Education*, 391 U.S. 563, 568 (1968). But:

> "At the same time it cannot be gainsaid that the State has interests as an employer in regulating the speech of its employees that differ significantly from those it possesses in connection with regulation of the speech of the citizenry in general. The problem in any case is to arrive at a balance between the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." *Ibid.*

The balance was not conclusively tipped in *Pickering* by the school board's assertion that "the teacher by virtue of his public employment has a *duty of loyalty* to support his supervisors in attaining the generally accepted goals of education," *id.* at 568 (emphasis added), and neither can it be conclusively tipped here by the Board's assertion that it wishes to confine continuing contracts only to those who "have shown through their words and actions that they

truly support the philosophy and goals of the Mt. Healthy school system," App. 289. Indeed, the Board's attitude here is by far the more dangerous, for the board in *Pickering* thought that the "duty of loyalty" extended only to the point that "if [a teacher] must speak out publicly, he should do so factually and accurately, commensurate with his education and experience", 391 U.S. at 568-569, while here the Board condemned Doyle for doing precisely that.

In *Pickering,* this Court afforded First Amendment protection to false statements critical of a school board's policies. The Court found that the balance tipped in favor of First Amendment protection, because on the one hand the subject was "a matter of legitimate public concern" while on the other there was no evidence that the teacher's criticism had had effects "detrimental to the interests of the schools," 391 U.S. at 571; there was no showing, nor could it be presumed, that the criticism "in any way either impeded the teacher's proper performance of his daily duties in the classroom or . . . interfered with the regular operation of the schools generally." *Id.* at 572-573.[14] If, absent a showing of

[14] In *Tinker* v. *Des Moines School Dist.,* 393 U.S. 503 (1969), a case involving the First Amendment rights of *students,* this Court adopted as the controlling tests whether engaging in the speech would "materially and substantially interfere with the requirements of appropriate discipline in the operation of the school," *id* at 509, or "involves substantial disorder or invasion of the rights of others," *id* at 513. In applying those tests, "undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression," *id* at 508; there must be "something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint," *id* at 509. Although recognizing that the interests to be weighed are in some respects different when the rights of *teachers* are involved, the lower courts have deemed these tests applicable to teacher cases as well, relying in part upon the *Tinker* decision's declaration that it cannot "be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate," *id* at 506. See, e.g., *James* v. *Board of Education,* 461 F.2d 566 (2nd Cir. 1972), cert. denied 409 U.S. 1042 (1972); *Russo* v. *Central Sch. Dist. No. 1,* 469 F.2d 623 (2nd Cir. 1972), cert. denied 411 U.S. 932 (1973); *Acanfora* v. *Board of Education of Montgomery County,* 491 F.2d 498, 500-501 (4th Cir. 1974), cert. denied 419 U.S. 836 (1974).

such detriment, stinging false criticism of the type involved in *Pickering* is protected, surely, in the same circumstances, sober accurate factual disclosure is protected as well. We turn, therefore, to assess the possible bases for contending that there was here a "detriment to the interests of the school" which outweighted Doyle's First Amendment interests.

The concern which actuated the Board appears to have been that public interest and controversy about its actions is *per se* detrimental. As the Board is dependent upon voter approval of bond issues, it is greatly concerned with its "public relations image." If exposure of its actions to public view leads to an unfavorable public impression of its work, the public may respond by disapproving bond issues. Surely this reasoning is a classic example of mistakenly equating "the Board members' own interests with that of the schools." *Pickering,* 391 U.S. at 571. Ohio has opted for *citizen* determination, not Board member determination, on bond issues. That the citizens are informed when they vote can hardly be a "detriment" to the schools. *Id.* at 571-572. The only thing which made *Pickering* a difficult case was that the citizens had been *falsely* informed by the teacher; that fact is not present here.

There are three other matters, unique to the employer-employee relationship, which warrant examination in this case in determining whether there was "detriment to the schools": (1) did Doyle, by disclosing the memo, violate a legitimate school interest in confidentiality? (2) did his action threaten to undermine his working relationship with the principal? (3) did his failure to first discuss the matter with school administrators violate an obligation to exhaust internal remedies? As we show, none of these considerations

tips the scales in this case against First Amendment protection.

(1) *Confidentiality.* One area in which a public employee's status differs from that of an ordinary citizen is his access to materials and information which have not been publicly disclosed. Although there is a national trend toward providing greater access to the internal workings of government,[15] there of course remain situations in which there is a valid governmental interest against disclosure.[16] In *Pickering* this Court found it "possible to conceive some positions in public employment in which the need for confidentiality is so great that even completely correct public statements might furnish a permissible ground for dismissal," 391 U.S. at 570, n. 3. But this case surely does not fit that category.

The memorandum imposing the dress code did not instruct teachers to keep its contents confidential, nor could any "need for confidentiality" reasonably have been discerned by its recipients. On the contrary, the memo stressed that the reason for adopting the dress code was "to establish good public relations between the professional teacher of Mt. Healthy and the general public" (App. 294), suggesting if anything that publication of the dress code's adoption would be consistent with the interests of the school system. This case thus does not present the troublesome question whether a published rule requiring confidentiality may lawfully inhibit employee speech which

[15] That trend is reflected at the federal level in the original enactment of the Freedom of Information Act (5 U.S.C. § 552) and in its repeated liberalization, Pub. L. 89-554, Sept. 6, 1966, 80 Stat. 383; Pub. L. 90-23, § 1, June 5, 1967, 81 Stat. 54; Pub. L. 93-502, §§ 1-3, Nov. 21, 1974, 88 Stat. 1561, and at the state level by the widespread adoption of "sunshine" laws requiring administrative bodies such as school boards to reach their decisions at public meetings. See, e.g., O.R.C. § 121.22

[16] See e.g., the exceptions to the Freedom of Information Act, 5 U.S.C. § 552(b).

would otherwise be protected by the First Amendment. Cf. *Hanneman* v. *Breier,* 528 F.2d 750 (7th Cir. 1976).

Moreover, there has been absolutely no showing that disclosure here compromised the interests of the school system in any way.[17] It is conceded that disclosure had no effect within the school system. App. 90. And, as we have shown, the Board members' "public relations" desire to shield their actions from public scrutiny is not an interest warranting consideration in the balance.

(2) *Impairment of Working Relationships.* In *Pickering,* this Court recognized that the First Amendment interests *might* be outweighed in situations where "the relationship between superior and subordinate is one of such a personal and intimate nature that certain forms of public criticism of the superior by the subordinate would seriously undermine the effectiveness of the working relationship between them." 391 U.S. at 570, n. 3. But this is not such a case. The record does not reflect that Doyle's relationship with the principal was of "a personal and intimate nature" (there were 88 teachers in the high school, App. 280-286), but even if it were, disclosure of the dress code memorandum cannot be "that certain form of public criticism" to which *Pickering* referred: Doyle criticized no one; he merely reported the memo's contents. And the policy which the memo con-

[17] Not only has there been no showing here; it is impossible to *conceive* of how Doyle's disclosure of the memo could have compromised legitimate school interests. The principal knew that the memo would stir a controversy among the teachers (App. 108), but they were all recipients of the memo and thus did not learn of it through Doyle's disclosure. Arguably, disclosure might have awakened student interest in the matter, but it is rather difficult to believe that the high school students would have observed the sudden change in teachers' dress without realizing what had happened or at least inquiring and learning what had happened. And if, to assume the "worst," Doyle's disclosure stirred an interest among students which might otherwise not have developed, it is difficult to perceive what governmental interest would have been jeopardized. The First Amendment, after all, was designed to protect speech which awakens interest.

veyed was "the suggestion of the Board of Education" (App. 289), not the principal's.

(3) *Exhausting Internal Channels.* The facts of *Pickering* furnished this Court "no occasion . . . for consideration of the extent to which teachers can be required by *narrowly drawn grievance procedures* to submit complaints about the operation of the schools to their superiors for action thereon prior to bringing the complaints before the public," 391 U.S. at 572 (emphasis added). It is not contended that there were here "narrowly drawn grievance procedures" through which dissatisfaction with the dress code could be channeled, and thus this concern is equally irrelevant here.

Doyle's principal testified that his disapproval of Doyle's call to WSAI was in part that Doyle had not talked to him first (App. 89)[18]. This is insufficient to bring this case within the "grievance procedure" exception recognized in *Pickering*, and is legally insufficient for two additional reasons.

First, while this may have been one of the reasons for the *principal's* disapproval of Doyle's actions, it was not the reason for the *Board's* decision to deny him a continuing contract. The letter explaining the Board's decision, App. 289, makes no mention of a failure to talk to the principal first but, rather, complains only that Doyle made the memo public and thus "raised much concern" in the community. That complaint would have been just as applicable if Doyle had called WSAI *after* talking to the principal.

Second, the context in which the memo was issued must be recalled. The dress code was under discussion in collective bargaining and, despite a prior assurance that it would not do so, the Board unilaterally imposed its will on the issue. It was thus the Board which removed the issue from the only internal channel—collective bargaining—established to deal with it. Surely, when management abandons joint-negotiation on a collective bargaining topic it cannot then condemn a union leader for going "outside channels" to publicize that fact. The one Board member who testified that *her* concern was Doyle's "undercutting" of the negotiations (App. 199-200) was simply blinded to the fact that it was the Board, by acting unilaterally, which had put the knife to the bargaining process. *Cf. Labor Board v. Katz*, 369 U.S. 736 (1962).

[18] It was also in part a fear of public reaction, App. 66.

In sum, there are no considerations unique to the employer-employee relationship which justified denying Doyle the right to speak enjoyed by any other citizen. In the circumstances here, as in *Pickering*, 391 U.S. at 573, "the interest of the school administration in limiting teachers' opportunities to contribute to public debate is not significantly greater than its interest in limiting a similar contribution by any member of the general public."

Nor is it an answer, as petitioner contends (Brief, p. 11), that the Board predicated its action upon a "notable lack of tact" shown by Doyle in publicizing the memo (App. 289). The district court surely was correct in concluding that the exercise of First Amendment rights cannot be punished because perceived as tactless by the objects of the speech (App. 28). The Board members may well have been sincere in thinking it was "tactless" of Doyle to embarass them by exercising his First Amendment rights, but putting a label on their unhappiness that he chose to speak does not make their action any less an infringement of his rights. Cases can be imagined in which a teacher exercises his right to speak in so patently offensive or tactless a manner as to cast doubt upon his capacities as a teacher. But here Doyle did no more than read the dress code memo to a radio station. His "notable lack of tact" was not the manner of his speaking, but that he chose to speak at all. In this context, "lack of tact" is but a label for punishing speech itself. Cf. *Ramsey* v. *Hopkins*, 320 F. Supp. 477, 481 (N.D.

Ala. 1970), affirmed in relevant part, 447 F.2d 128 (5th Cir. 1971); *Sindermann* v. *Perry*, 430 F.2d 939, 943 (5th Cir. 1970), affirmed 408 U.S. 593 (1972); *Rampey* v. *Allen*, 501 F.2d 1090, 1099 (10th Cir. 1974), cert. denied 420 U.S. 908 (1975).

Finally, it makes no difference to the constitutional analysis that the Board here was deciding whether to confer a continuing contract rather than a one-year contract. The magnitude of the stakes justified the Board's carefully weighing the *legitimate* considerations which should inform its decision, but they did not permit reliance upon constitutionally impermissible reasons. A continuing contract, like a one-year contract, is a benefit which the Board can withhold without finding just cause, *Bishop* v. *Wood*, —— U.S. ——, 44 LW 4820, 4823 (1976), but not for "the exercise of an employee's constitutionally protected rights." *Ibid.*

Indeed, in the circumstances here, the fact that the decision involved a continuing contract *heightens* the First Amendment interest. For there are indications that the Board might have awarded Doyle another one-year contract, if that were all that had been at stake, and that their decision was prompted by a desire not to grant tenured status to a teacher who had demonstrated a capacity to speak out publicly on the Board's actions. The letter to Doyle, App. 289, explained that "*continuing contracts* normally are awarded to those staff members who . . . have shown through their words and actions that they truly support the philosophy and goals of the Mt. Healthy school system" (emphasis added), a standard to which Doyle's call to WSAI was unfaithful. That the rationale was keyed to the continuing contract decision could only intensify the "chilling effect" which accompanies any intrusion upon teachers' First Amendment rights.

This Court, in vindicating teachers' First Amendment claims, has repeatedly declared that "the viligant protection of constitutional freedoms is nowhere more vital than in the community of American schools." *Shelton* v. *Tucker*, 364 U.S. 479, 487 (1960). *Accord: Keyishian, supra*, 385 U.S. at 603; *Wieman, supra*, 344 U.S. at 195. See also, *Healy* v. *James*, 408 U.S. 169. In *Shelton*, 364 U.S. at 479, the Court adopted this analysis from Justice Frankfurter's concurring opinion in *Wieman*, 344 U.S. at 195:

> "By limiting the power of the States to interfere with freedom of speech and freedom of inquiry and freedom of association, the Fourteenth Amendment protects all persons, no matter what their calling. But, in view of the nature of the teacher's relation to the effective exercise of the rights which are safeguarded by the Bill of Rights and by the Fourteenth Amendment, inhibition of freedom of thought, and of action upon thought, in the case of teachers brings the safeguards of those amendments vividly into operation. Such unwarranted inhibition upon the free spirit of teachers . . . has an unmistakable tendency to chill that free play of the spirit which all teachers ought especially to cultivate and practice; it makes for caution and timidity in their associations by potential teachers."

Nothing will "chill" the free speech of teachers more than a school board's demonstration that it will not confer tenure upon those who exercise it. Tenure is the most important benefit a teacher can hope for: it converts his status from one of dependency upon annual renewal decisions which may be attended by unreviewable "mistakes . . . inevitable in the day-to-day administration of our affairs," *Bishop* v. *Wood, supra*, 44 LW at 4823, to one of permanent protection against removal without cause, and with a right to procedural due process when such removal is contemplated. *Perry, supra*, 408 U.S. at 599-603. First Amendment values could not survive in the public schools under a rule which forbade school boards from relying upon exercises of free

speech in making annual renewal decisions but permitted them to rely upon such exercises in making tenure decisions. There are few teachers whose sights are set only on the next year, with no concern for their career.

B. The District Court's Finding That The WSAI Call Played "A Substantial Part" In The Board's Decision To Deny A Continuing Contract Is Amply Supported By The Record, And Therefore The Board's Decision Violated Doyle's First Amendment Rights.

When government acts against a citizen in part because of his exercise of constitutionally protected conduct, it by definition infringes a constitutional right of that citizen. The courts below found that Doyle had been deprived of a continuing contract to teach at a public school in part—in "substantial part" according to the district court—because of his exercise of conduct protected by the First Amendment. That finding, amply supported by the record evidence, is sufficient to establish a violation of Doyle's First Amendment rights.

We have just shown that Doyle's phone call to WSAI was protected by the First Amendment. When Doyle asked the Board to explain its decision not to renew him, the Board listed that phone call as the first of only two reasons for its action. At trial not a single witness denied that the phone call had played a part in the decision to deny Doyle a continuing contract. The district court, after hearing all the evidence, found that the WSAI call played "a substantial part" in the Board's decision (App. 28):

> "That is clear from the letter of the Superintendent immediately following the Board's decision, which stated two reasons—the one, the conversation with the radio station clearly protected by the First Amendment."

The court of appeals concluded (App. 34-35):

> "substantial evidence in the record supports the finding of the district court to the effect that appellant's action in refusing to renew appellee's contract was motivated at least in part by his action in informing a local radio station of an 'appropriate dress code' suggested for teachers, and that the district court did not err in concluding that the refusal to renew the contract was based upon a constitutionally impermissibly reason."

Petitioner seems to make two challenges to these factual and legal conclusions: (1) the court of appeals characterized the district court's finding as that petitioner "was motivated at least in part" by a unconstitutional consideration—instead of "in substantial part"—and therefore the court of appeals applied an erroneous standard of law (Brief at 14); (2) the district court's finding that an unconstitutional reason played "a substantial part" in the Board's decision is not supported by the evidence (Brief at 11). We deal with these challenges in turn.

First, we do not understand the court of appeals to have reversed, or even questioned, the factual finding of the district court that the WSAI phone conversation played "a substantial part" in the Board's decision. The court of appeals said in fact that "the record supports the finding of the district court." The failure of the court of appeals to use the word "substantial" in describing the finding of the district court is reflective not of the appellate court's differing view of the facts here but rather, in all likelihood, of its view of the applicable legal standard. Thus, even if the legal standard apparently adopted by the court of appeals were erroneous, petitioner would not be helped, for the factual finding made by the district court (which is both supported in the record, as we show below, and unchanged by the court of appeals) is sufficient to meet the legal standard which petitioner asserts is correct: if "the constitutionally impermissi-

ble reason played a substantial part in the nonrenewal" decision, the decision is defective (Brief at 14).

In any event, we believe petitioner is wrong as to the applicable legal standard and that the standard stated in the court of appeals' decision is correct. As discussed in part A, this Court has ruled that "even though the government may deny . . . [a] benefit for any number of reasons, there are *some reasons upon which the government may not rely.*" *Perry* v. *Sindermann, supra,* 408 U.S. at 597 (emphasis added). The nonrenewal of a public school teacher "may not be predicated upon his exercise of First and Fourteenth Amendment rights." (*Id.* at 598). The rationale for this rule is no less applicable where a nonrenewal is predicated in part upon such a constitutionally impermissible consideration. Whether a teacher's employment is terminated wholly or partially in retaliation for the exercise of First and Fourteenth Amendment rights, a penalty is exacted for that exercise, and future exercise of those rights by that teacher or others will be chilled. The federal courts of appeals have uniformly ruled that a "decision to terminate employment of a teacher which is only *partially* in retaliation for the exercise of a constitutional right is unlawful." *Gray* v. *Union County Intermediate Education District,* 520 F.2d 803, 806 (9th Cir. 1975). Accord: *Skehan* v. *Board of Trustees of Bloomsburg state Col.,* 501 F.2d 31, 39 (3rd Cir. 1974), remanded for further consideration on other grounds, 421 U.S. 983 (1975), rehearing *en banc* on other grounds, —— F.2d ——, No. 73-1613 (1976); *Langford* v. *City of Texarkana, Ark.,* 478 F.2d 262, 266, 268 (8th Cir. 1973); *Gieringer* v. *Center School District No. 58,* 477 F.2d 1164, 1166, n. 2 (8th Cir. 1973), *cert. denied,* 414 U.S. 832; *Simard* v. *Board of Education of Town of Groton,* 473 F.2d 988, 995 (2d Cir. 1973); *Cook County College Teachers Union* v. *Byrd,* 456 F.2d 882, 888 (7th Cir. 1972); *Fluker* v. *Alabama State Board of Education,* 441 F.2d 201, 210 (5th Cir. 1971).

Petitioner argues that under the rule adopted by these courts "a teacher might participate in unpopular conduct just to insure employment" (Brief at 15). But this argument misapprehends the meaning of the rule. The rule provides no protection to a teacher who is terminated for permissible reasons, regardless of whether coincidentally the teacher has engaged in protected activity. Nor is the rule invoked by the mere fact that governmental decisionmakers are aware of, and view with distaste, a public employee's involvement in protected activities, so long as that involvement does not play a part in their decision. The rule has effect only where the teacher, or other public employee, can show that the government *relied upon* the impermissible reason in reaching its decision.

Second, it is undisputed here that the WSAI phone conversation played a part in the Board's determination to deny petitioner a continuing contract. Petitioner seeks to relitigate in this Court the correctness of the district court's finding that the conversation played "a substantial part" in that determination. As we have just shown, whether the part played by the conversation was "substantial" or something less than that is not a matter of legal significance. Nevertheless, there is no difficulty in demonstrating that there is ample support in the record for the district court's finding.

The only explanation for the Board's action given contemporeously with that action, the only explanation given without the self-serving pressures of litigation, is that contained in the letter of explanation sent to Doyle by the Superintendent after consultation with the Board (App. 247-248, 289). That letter listed two incidents as the basis for the Board's decision. The first was: "You assumed the responsibility to notify WSAI Radio Station in regards to the suggestion of the Board of Education that teachers establish an appropriate dress code for professional people" (App. 289). This letter alone is sufficient basis for the court's find-

ing of fact. But petitioner would have this Court undertake to make its own evaluation of the proper weight to be given this evidence (Brief at 11):

> "The [Superintendent's] letter standing alone does not justify a conclusion that the Board based its decision substantially on the phone call because (1) the Superintendent, not the Board, wrote the letter and (2) in it expressly stated that the reason was Doyle's lack of tact."

Neither of these arguments undermines the district court's finding. While the Superintendent, the Board's agent, wrote the letter, he testified that before sending it he consulted with the Board as to "the terms that were going to be put in the communique" (App. 247-248). And, as we have already shown in Part A, "lack of tact" was not an independent factor on which the Board relied but was the conclusion the Board drew from the two incidents set forth in the letter, the first of which was the WSAI phone call. There is thus no basis for overturning the district court's finding of fact that the WSAI call played "a substantial part" in the Board's decision.

The conclusion of the courts below that the Board's decision to deny Doyle a continuing contract was in violation of the First Amendment should be upheld.

C. The Remedy Awarded By The Courts Below Properly Restores To Doyle What He Was Unconstitutionally Denied: A Continuing Contract To Teach.

The Board denied Doyle a continuing contract to teach on account of Doyle's exercise of First Amendment rights. The courts below had an obligation to fashion a remedy which truly "make[s] good the wrong done." *Bell* v. *Hood*, 327 U.S. 678, 684, (1946). The wrong here is not made good if Doyle remains in a less advantageous position because of his exercise of First Amendment rights. Thus, at a

minimum a proper remedy must restore to Doyle what he was unconstitutionally denied: a continuing contract to teach. That is the remedy ordered by the district court and upheld by the court of appeals. It should be sustained here.

Consistent with the decisions below in this case, the federal courts of appeals uniformly have held that reinstatement is a necessary part of the remedy where a teacher, or other public employee, has been terminated from employment for the exercise of rights protected by the First Amendment.

> "While the equitable relief of reinstatement of state employees discharged in violation of their constitutional rights has been primarily used in teacher dismissals, the Courts have established the principle that reinstatement is a necessary element of an appropriate remedy in wrongful employee discharge cases . . ."

Abbott v. *Thetford*, 529 F.2d 695, 701 (5th Cir. 1976); see also, e.g., *Sterzing* v. *Fort Bend Independent School District*, 496 F.2d 92, 93 (5th Cir. 1974); *Janetta* v. *Cole*, 493 F.2d 1334, 1338 (4th Cir. 1974); *Gieringer* v. *Center School District No. 58*, 477 F.2d 1164, 1167 (8th Cir. 1973), *cert. denied*, 414 U.S. 832; *Cole* v. *Choctaw County Board of Education*, 471 F.2d 777, 779 (5th Cir. 1973); *Hanover Township Federation of Teachers* v. *Hanover Community School Corp.*, 457 F.2d 456 (7th Cir. 1972), affirming, 318 F. Supp. 757, 763 (N.D. Ind. 1970); *Ramsey* v. *Hopkins*, 477 F.2d 128 (5th Cir. 1971).[19] Where the rights violated derive from the First Amendment, it is particularly important that the remedy make the victim whole. A remedy

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[19] See also, *Skehan* v. *Board of Trustees of Bloomsburg State College, supra*, 501 F.2d at 45; *Stolberg* v. *Board of Trustees for State College of Connecticut*, 474 F.2d 485, 491 (2d Cir. 1973); *Donahue* v. *Staunton*, 471 F.2d. 475, 477, 480 (7th Cir. 1972); *Johnson* v. *Branch*, 364 F.2d 177 (4th Cir. 1966) (*en banc*), *cert. denied*, 385 U.S. 1003; *Smith* v. *Hampton Training School for Nurses*, 360 F.2d 577, 581 (4th Cir. 1966) (*en banc*).

which leaves a teacher disadvantaged for the exercise of First Amendment rights would have a "chilling effect" on the willingness of that teacher and others to engage in such protected conduct; by the same token, a school board would be given the message that it may after all achieve the improper result it sought—the suppression of unwanted expression.[20]

Petitioner implicitly agrees that in the normal case reinstatement—here with a continuing contact—is the appropriate relief for a non-renewal which violates the First Amendment (Brief at 14-15). Petitioner argues, however, that in this case the normal rule should not apply because the Board's decision was based on permissible factors as well as impermissible ones (Brief at 14). We address that argument now.

As we have shown, the Board did in fact base its decision in part on an impermissible consideration in violation of Doyle's First Amendment rights. And, as we have shown, the proper remedy for this violation is to make Doyle whole —to place him in the position in which he would have been but for the Board's unconstitutional decision. That the Board's decision was based in part on permissible as well impermissible factors is pertinent only if it could be established that the Board would have made the same decision to deny Doyle a continuing contract even without the impermissible factor— even without the WSAI phone call. For then, and only then, is it fair to say that but for the Board's unconstitutional decision Doyle still would not have had a continuing contract. However, as we now show, it was the Board's burden to prove that this is such a case; and, that burden is a heavy one which was not met here.

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[20] *Cf., Smith* v. *Hampton Training School for Nurses, supra,* 360 F.2d, at 581; *Albemarle Paper Co.* v. *Moody,* 422 U.S. 405, 417-418 (1975); *Louisiana* v. *United States,* 380 U.S. 145, 154 (1965).

"The most elementary conceptions of justice and public policy require that the wrongdoer shall bear the risk of uncertainty which his own wrong has created." *Bigelow* v. *RKO Radio Pictures,* 327 U.S. 251, 265 (1946). In the words of Judge Learned Hand, speaking for the court in *NLRB* v. *Remington Rand, Inc.,* 94 F.2d 862, 872 (2nd Cir. 1938), "it rest[s] upon the [wrongdoer] to disentangle the consequences for which it is chargeable from those from which it was immune." See also, *Baxter* v. *Savannah Sugar Refining Corp.,* 495 F.2d 437, 445 (5th Cir. 1974), *cert. denied,* 419 U.S. 1033. Doyle's entitlement to reinstatement was presumptively established when he proved that a basis for the Board's decision was his exercise of First Amendment rights. If the Board wished to defeat that entitlement it had to show clearly and convincingly that the consequences flowing from its wrong would have occurred in any event.

A useful analogy is found in decisions dealing with the question who is entitled to a "make-whole" remedy where racial discrimination in employment has been proved. Where, for example, an employer is shown to have engaged in a pattern and practice of racial discrimination in hiring, the impermissible factor of race can be said to have played a part each time a black employee was denied a job.[20a] But, in some circumstances, an employer may be able to prove that notwithstanding its racial discrimination, the applicant would have been denied a job in any event for other legitimate reasons. This Court held in *Franks* v. *Bowman Transportation Co.,* —— U.S. ——, 44 LW 4356, 4363, and 4363, n. 32 (1976), that, in such circumstances, each black applicant is "presumptively entitled" to make-whole relief, and

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[20a] In the instant case the showing is stronger: here the finding of causation does not rest upon an inference from a pattern of conduct, but rather upon the employer's own admission that he relied upon the impermissible factor.

that the employer has the burden of defeating that entitlement with respect to any particular employee by proving that the employee would have been denied a job regardless of the race factor. As the Court in *Franks* put it, "No reason appears . . . why the victim rather than the perpetrator of the illegal act should bear the burden of proof on this issue." *Ibid.*

Indeed, good reason appears why the burden should be borne by the perpetrator of the wrong. In addition to the inherent fairness of requiring the proven wrongdoer to provide his own escape hatch, there is the practical consideration that the facts pertinent to the issue of what the employer would have done in the absence of the impermissible factor are peculiarly within the knowledge of the employer.

The federal courts of appeals have established that the employer can meet the burden described in *Franks* only by "clear and convincing" evidence. See, *e.g., Day* v. *Mathews,* 530 F.2d 1083, 1085 (D.C. Cir. 1976); *Baxter* v. *Savannah Sugar Refining Corp., supra,* 495 F.2d at 444-445; *Johnson* v. *Goodyear Tire and Rubber Co.,* 491 F.2d 1364, 1375, 1379-1380 (5th Cir. 1974). This standard is essential to assure that the victim of the wrong is not mistakenly denied relief.

The analysis of *Franks* and the court of appeals decisions just cited applies with equal force to the situation here where the exercise of First Amendment rights rather than race is the impermissible factor taken into account by this public employer. Suppose, for example, the Board had written a letter to a black teacher explaining that he had been denied a continuing contract because:

> "A. You are black. This raised much concern not only within this community, but also in neighboring communities.
>
> "B. You used obscene gestures to correct students in a situation in the cafeteria causing considerable concern among those students present."

That teacher would have been entitled to the remedy awarded here unless the Board could show by clear and convincing evidence that it would have reached the same decision regardless of race. The same result should obtain here where the first reason given is Doyle's exercise of conduct protected by the First Amendment. Surely, rights derived from the First Amendment stand on equal footing with the statutory right to be free of racial discrimination in employment. Indeed, this Court has always required that whatever rules may apply in other contexts, "freedoms of expression must be ringed about with adequate bulwarks." *Bantam Books, Inc.* v. *Sullivan,* 372 U.S. 58, 66 (1963).

By the standard thus applicable, petitioner has failed to meet its burden. At trial, none of petitioner's witnesses denied that the WSAI call played a part in the Board's decision; none of petitioner's witnesses testified that the Board would have reached the same result if it had not considered that call.[20b] Petitioner presented no showing which would defeat Doyle's presumptive entitlement to reinstatement with a continuing contract. That remedy was therefore properly awarded by the courts below.

III. THE ELEVENTH AMENDMENT DOES NOT BAR THE BACKPAY AWARD AGAINST THE SCHOOL BOARD

The Board did not assert an Eleventh Amendment defense in the district court. That court, construing O.R.C. §3313.17 as a statutory waiver of whatever Eleventh Amendment immunity school boards might otherwise en-

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[20b] We do not mean to suggest that such testimony, had it been offered without corroborative evidence, would have deserved uncritical acceptance by the district court.

joy,[21] regarded the Board's silence as a "concession" to that effect. App. 30. Awakened by the district court's decision, the Board made the Eleventh Amendment its principal claim on appeal.[22] Argument No. 1 in its appellate brief was titled:

> "The Eleventh Amendment of the United States Constitution grants sovereign immunity to political entities of the State, including the Mt. Healthy Board of Education. That immunity is not waived by section 3313.17 of the Ohio Revised Code."

Doyle countered with arguments (1) that the School Board is not the "State" for Eleventh Amendment purposes, and (2) that, if it is, its immunity was waived in §3313.17. The Court of Appeals affirmed without discussion of this issue.

We show herein that the Eleventh Amendment does not

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[21] §3313.17 provides, in pertinent part:
"The board of education of each school district shall be a body politic and corporate, and, as such, capable of suing and being sued, contracting and being contracted with, acquiring, holding, possessing and disposing of real and personal property, and taking and holding in trust for the use and benefit of such district, any grant or devise of land and any donation or bequest of money or other personal property."

[22] The Board was not foreclosed from invoking the Eleventh Amendment for the first time on appeal. *Edelman* v. *Jordan*, 415 U.S. 651, 677-678 (1974); *Sosna* v. *Iowa*, 419 U.S. 393, 396 n.2 (1975). However, its failure to assert this "defense" (*Sosna, supra*) in the district court has meant that no evidence was introduced by either party which might illuminate its status for Eleventh Amendment purposes, e.g. evidence relating to the financial relationship between the Board and the State. In some circumstances, this evidentiary gap might disable appellate courts from adjudicating the Eleventh Amendment issue and necessitate a remand. See, e.g., *Soni* v. *Board of Trustees of University of Tennessee*, 513 F.2d 347, 352 (6th Cir. 1975), cert. denied, 44 LW 3702 (1976). In the instant case, however, we believe the Eleventh Amendment issue can be resolved without remand, for Ohio statutes and decisions demonstrate on their face that school boards are not the "arm or alter ego" of the State and thus do not share the State's Eleventh Amendment immunity.

bar the backpay award against the Board: the Board is not the "State" for Eleventh Amendment purposes. Because the Board so clearly does not enjoy Eleventh Amendment protection it is unnecessary for this Court to reach the question whether, as held below, §3313.17 constituted a waiver of such protection.[23]

The Eleventh Amendment provides:

> "The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any foreign country."

Despite its literal wording, the Eleventh Amendment applies to suits by a citizen against his own state. *Hans* v.

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[23] Were it necessary to reach that question, the construction of §3313.17 by the district court, affirmed by a unanimous court of appeals panel including two Ohio judges, would be entitled to affirmance without "independent examination of the state law issue" by this Court. *Bishop* v. *Wood*, —— U.S. ——, 44 LW 4820, 4822 (1976). There is no state court decision squarely in point, but the Ohio Supreme Court decisions establish that a school board has been "stripped of its attributes of sovereignty", and is to be treated like "any other litigant", when sued with respect to the exercise of any of its powers enumerated in §3313.17 (which includes the powers to contract and be contracted with). *State ex rel. Board of Education* v. *Gibson*, 130 Ohio St. 318, 199 N.E. 185, 187 (1935):

> "Not being an entire sovereignty, there is no sound reason for treating it in a manner different from the manner of treating any other litigant. The law should be of universal application and without distinction among litigants. The fact that a board of education or school district is engaged in a public task is an immaterial circumstance. When it is rendered subject to suit without consent, it is automatically stripped of its attribute of sovereignty and of the exemptions and immunities available to sovereignties."

See also *Brown* v. *Board of Education*, 20 Ohio St. 2d 68, 253 N.E. 2d 767 (1969), explaining the distinction between this principle and that applicable to common law tort actions which do not "relate to" a school board's exercise of its §3313.17 powers.

Louisiana, 134 U.S. 1 (1890); *Edelman* v. *Jordan,* 415 U.S. 651, 662-663 (1974).

Theoretically, a state might so structure its affairs that all governmental functions were performed by the state government. In that event, the Eleventh Amendment would shield all such functions from monetary exposure in federal court actions. But that has not been the experience of our nation. In practice, every state has opted to transfer power over many governmental functions to legally separate entities—cities, towns, counties, school boards, etc.—whose officers are elected locally, and who have sources of revenue independent of the state treasury. This option for local control has had critical significance to the application of the Eleventh Amendment.

It is hornbook law that "a suit against a county, a municipality, or other lesser governmental unit is not regarded as a suit against a state within the meaning of the Eleventh Amendment." Hart and Wechsler, *The Federal Courts and the Federal System,* 690 (2d Ed.). As the Court explained in *Hopkins* v. *Clemson Agricultural College,* 221 U.S. 636, 645 (1911):

> "[N]either public corporations nor political subdivisions are clothed with that immunity from suit which belongs to the state alone by virtue of its sovereignty."

Accord: *County of Lincoln* v. *Luning,* 133 U.S. 529 (1890); *Kennecott Copper Corp.* v. *State Tax Commission,* 327 U.S. 573, 579 (1946). See also, *Moor* v. *County of Alameda,* 411 U.S. 693, 717-721 (1973).

In *Edelman* v. *Jordan, supra,* 415 U.S. at 667, n. 12, this Court drew a sharp distinction between Illinois' Department of Public Aid (the agency involved in *Edelman*) and a county in Virginia which the Court had previously ruled was *not* entitled to the state's Eleventh Amendment immunity:

> "The Court of Appeals considered the Court's decision in *Griffin* v. *School Board,* 377 U.S. 218 (1964), to be of [relevance]. But as may be seen from *Griffin's* citation of *Lincoln County* v. *Luning,* 133 U.S. 529 (1890), a county does not occupy the same position as a State for purposes of the Eleventh Amendment. See also *Moor* v. *County of Alameda,* 411 U.S. 693 (1973). The fact that the county policies executed by the county officials in *Griffin* were subject to the commands of the Fourteenth Amendment, but the county was not able to invoke the protection of the Eleventh Amendment, is no more than a recognition of the long-established rule that while county action is generally state action for purposes of the Fourteenth Amendment, a county defendant is not necessarily a state defendant for purposes of the Eleventh Amendment."

Of course, states create some agencies which are not autonomous, but are simply administrative vehicles through which the state exercises powers which it has *not* passed to local control. Agencies of this type are an integral part of the state government, and suits against such agencies are really suits against the state. Thus, in *State Highway Commission of Wyoming* v. *Utah Construction Co.,* 278 U.S. 194, 199 (1929), the Court found the Wyoming's Highway Commission was covered by the Eleventh Amendment because the Commission "was but the arm or alter ego of the state with no funds or ability to respond in damages." But local school boards are not of this character. To be sure, most states retain *some* measure of control over public education. The legislature can revise the governing statutes, and in most states, as in Ohio, a state board of education has been created to perform certain enumerated duties of statewide interest. See O.R.C. §3301.17.[24] But in most states,

[24] That *state* board, of course, might well constitute an "arm or alter ego of the state" and thus partake of the State's Eleventh Amendment immunity.

including Ohio as we will soon show, vast quantities of power have been turned over to locally elected school boards, in implementation of a policy judgment that the public schools should be locally controlled and managed. Among these are tax-levying and bond-issuing powers which enable school boards to generate independent revenues and assure that monetary judgments against school boards will not impact upon the state treasury.

Recognition of the autonomy of local school boards was critical to this Court's decision, in *Milliken* v. *Bradley,* 418 U.S. 717 (1974), that absent special circumstances multi-district relief cannot be awarded upon a finding of *de jure* discrimination within one school district. The Court rejected the district court's "analytical starting point"—that "school district lines are no more than arbitrary lines on a map drawn 'for political convenience' "—with this analysis, *Id* at 741-742:

> "[T]he notion that school district lines may be casually ignored or treated as a mere administrative convenience is contrary to the history of public education in our country. No single tradition in public education is more deeply rooted than local control over the operation of schools; local autonomy has long been thought essential both to the maintenance of community concern and support for public schools and to quality of the educational process. See *Wright* v. *Council of the City of Emporia,* 407 U.S., at 469. Thus, in *San Antonio School District* v. *Rodriguez,* 411 U.S. 1, 50 (1973), we observed that local control over the educational process affords citizens an opportunity to participate in decisionmaking, permits the structuring of school programs to fit local needs, and encourages 'experimentation, innovation, and a healthy competition for educational excellence.' "

Because school districts and school boards are in most

states autonomous political and corporate entities implementing a societal preference for local management and control of the public schools, it is hardly surprising that the overwhelming weight of judicial authority has found them not immunized by the Eleventh Amendment. *Hander* v. *San Jacinto Junior College,* 519 F.2d 273 (5th Cir. 1975) (Texas);[38] *Hutchison* v. *Lake Oswego School District,* 519 F.2d 961 (9th Cir. 1975) (Oregon); *Burt* v. *Board of Trustees of Edgefield School District,* 521 F.2d 1201 (4th Cir. 1975) (South Carolina); *Adams* v. *Rankin County Board of Ed.,* 524 F.2d 928 (5th Cir. 1975) (Mississippi); *Monnell* v. *Dept. of Social Services,* 532 F.2d 259 (2nd Cir. 1976) (New York City Board of Education); *Campbell* v. *Gadsden County Dist. School Bd.,* 534 F.2d 650, 655-656 (5th Cir. 1976) (Florida); *Morris* v. *Board of Education of Laurel Sch. Dist.,* 401 F. Supp. 188, 203-205 (D. Del. 1975) (Delaware); *Smith* v. *Concordia Parish School Board,* 387 F. Supp. 887 (W.D. La. 1975) (Louisiana). See also *Singer* v. *Mahoning County Board of Mental Retardation,* 519 F.2d 748 (6th Cir. 1975) (Ohio); Note, *Damage Remedies for Constitutional Violations,* 89 Harv. L. Rev. 922, 931-932 (1976). Contrast, *Harris* v. *Tooele County School District,* 471 F.2d 218 (10th Cir. 1973) (Utah) (judgment might be paid from state treasury).

Of course, this analysis would be inapplicable if Ohio, unlike most states, had *not* vested management and control in locally elected school boards established as separate political and corporate entities, or if Ohio had not provided school boards independent revenue powers and thus left

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[38] Although the defendant in *Hander* was a junior college district, the Court explained that "junior college districts in Texas enjoy the same legal and constitutional status as 'independent school districts,' " 519 F.2d at 279, n.13. See also *Wright* v. *Houston Independent School District,* 393 F. Supp. 1149 (S.D. Tex. 1975), holding that Texas school districts do not enjoy the state's Eleventh Amendment immunity.

judgments to be paid from the state treasury. But as both the Ohio decisions and the Ohio statutes make clear, Ohio has opted for a structure virtually identical to that in Michigan described in *Milliken, supra,* 418 U.S. at 742, n. 20.

> "The Legislature has entrusted, by statute, the entire management and supervision of the schools to boards of education and has given them virtually unlimited powers with regard to school matters and policy. [Citing *Stinson* v. *Board of Education,* 17 Ohio App. 437; 48 Ohio Jurisprudence 2d, pp. 780-781]."

State ex rel. Fleetwood v. *Board of Education,* 20 Ohio App. 2d 154, 252 N.E. 2d 318, 321 (1969).[36]

> "Boards of education have been invested by the General Assembly with extensive powers within their sphere of activity . . .
>
> "Under our statutes, a board of education is elected by vote of the people. As already indicated, it is charged with the management and control of the public schools and is authorized to employ and fix the salaries of those operating the schools. Moreover, it may 'make such rules and regulations as it deems necessary for its government and the government of its employees.'
>
> "It will thus be seen that the General Assembly has granted boards of education wide latitude and discretion in the particulars mentioned . . ."

Greco v. *Roper,* 145 Ohio St. 243, 61 N.E. 2d 307, 309-310 (1945), followed in *State* v. *Judges of Court of Common Pleas,* 173 Ohio St. 239, 181 N.E. 2d 261, 265 (1962), and *Holroyd* v. *Eibling,* 188 N.E. 2d 797, 801 (Ct. App. 1962).

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[36] Accord: *Long* v. *Bd. of Education, Ontario Local Sch. Dist.,* 45 Ohio Misc. 5, 340 N.E. 2d 439, 441 (Ct. Com. Pl. 1975); *Rumora* v. *Bd. of Edn. of Ashtabula Area City Sch. D.,* 43 Ohio Misc. 48, 335 N.E. 2d 378, 383-384 (Ct. Com. Pl. 1973).

See also *Dayton Classroom Teachers Association* v. *Dayton Board of Education,* 41 Ohio St. 2d 127, 131, 323 N.E. 2d 714, 717[37] (1975).

The Ohio Constitution, Art. VI, Sec. 3, mandates that the citizenry of every city "shall have the power by referendum vote to determine for itself the number of members and the organization of the district board of education, and provision shall be made by law for the exercise of this power . . ." The members of the school board are "elected at large by the qualified electors of such district." O.R.C. §3313.02.

"The board of education of each school district shall be a body politic and corporate, and, as such, capable of suing and being sued," O.R.C. §3313.17, and in it is vested the "management and control of all of the public schools of whatever name or character in its . . . district", §3313.47. To carry out this mandate, local school boards are armed with broad powers. "The board of education shall make such rules and regulations as are necessary for its government and the government of its employees, pupils of its schools, and all other persons entering upon its school grounds or premises," §3313.20. It is invested with the capacities of "contracting and being contracted with, acquiring, holding, possessing, and disposing of real and personal property, and taking and holding in trust for the use and benefit of such district, any grant or devise of land and any donation or bequest of money or other personal property." §3313.17.

The key to the local school board's autonomy, of course,

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[37] And see, *McClung* v. *Bd. of Ed. of City of Washington C.H.,* 46 Ohio St. 2d 149, 346 N.E. 2d 691, 695 (1976); *Justus* v. *Brown,* 42 Ohio St. 2d 53, 325 N.E. 2d 884, 887 (1975); *Long* v. *Board of Education,* 36 Ohio St. 2d 62, 64, 303 N.E. 2d 890, 892 (1973); *Wardwell* v. *Bd. of Ed. of City School Dist.,* 529 F.2d 625, 629 (6th Cir. 1976).

is its fiscal independence from the state. While each school board receives state aid pursuant to pre-fixed per-capita formulae, Chapter 3317, O.R.C., each board has the power to levy and collect taxes, unilaterally up to certain limits and by concurrence of the local electorate beyond those limits, §§5705.03, 5705.192, 5705.194, and to issue bonds, Chapter 133, O.R.C.[28]

In the face of this clear statutory design establishing local school boards as autonomous political and corporate entities, the Board offers two arguments to support its contention that it is the "State" for Eleventh Amendment purposes:

1. The Board asserts that school boards are "not authorized to raise taxes or sell property to pay a tort claim", and that the judgment below therefore could not be met "without further action by the state legislature" (Brief, p. 30). The Board is wrong. Even if a claim of constitutional violation were regarded as a "tort claim," no "further action by the state legislature" would be required to pay the judgment in this case. For the Ohio legislature has unquestionably empowered the Board to issue bonds if necessary for the payment of a judgment against it "in an action for personal injuries or based on any other non-contractual obligation." O.R.C. §133.27.[29] If the Board could not otherwise pay the judgment, yet failed to issue bonds in accordance with its power under §133.27, it could be compelled by mandamus to issue the bonds.[30] We doubt, however, that it would be necessary for the Board to resort to its bond issuing power to comply with the judgment herein. Ohio by statute provides for backpay awards against school boards, O.R.C. §3319.16, state courts in Ohio regularly issue backpay awards against school boards for violation of state law,[31] and the Board's tax levying authority is so broadly based—to meet "current operating expenses" (§5705.03), "indebtedness" (ibid.), "the necessary requirements of the school district" (5705.192), "current expenses of the school district" (ibid.), and "the emergency requirements of the school district" (§5705.194)—that it cannot credibly be contended that the Board is precluded from paying the judgment for backpay herein from its general tax revenues. While it is thus clear that the Board has power to pay the judgment, we do not understand how the Eleventh Amendment issue could be affected even if it were not. Plaintiff

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[28] In most school districts in Ohio, the majority of the revenues are derived from local taxes and not from the state. *Baldwins Ohio School Law,* Section T 123.02, page 148. Because petitioner did not assert an Eleventh Amendment defense in the district court, see n. 22 *supra,* evidence on this point as to this particular school district was not introduced below.

[29] § 133.27 is part of Ohio's Uniform Bond Law. We quote it below. As will be seen, its provisions apply to "any subdivision." The Bond Law expressly states that city school boards are "subdivisions" governed by its provisions, § 133.01(a). The text of § 133.27 is as follows:

"When the fiscal officer of any subdivision certifies to the bond issuing authority that, within the limits of its funds available for the purpose, the subdivision is unable to pay a final judgment or judgments rendered against the subdivision in an action for personal injuries or based on any other non-contractual obligation, then such subdivision may issue bonds for the purpose of providing funds with which to pay such final judgment in an amount not exceeding the amount of the judgment or judgments together with the costs of the suit in which such judgment or judgments are rendered, and interest thereon to the approximate date when the proceeds of such bonds are available."

[30] *State ex rel. Turner* v. *Bremen,* 116 Ohio St. 294, 156 N.E. 134 (1927); *State ex rel. Turner* v. *Bremen,* 117 Ohio St. 186, 158 N.E. 6 (1927).

[31] *Sorin* v. *Board of Education,* 39 Ohio Misc. 108 (Com Pl. 1974), reversed on another issue (this issue not appealed), 46 Ohio St. 2d 177 (1976); *State ex rel. Edmundson* v. *Board of Education of Northwestern Local Sch. Dist.,* 2 Ohio Misc. 137 (Com Pl. 1964); *Zartman v. Board of Education,* 33 Ohio Misc. 217 (Com Pl. 1972); *Board of Education* v. *Manoloff,* 5 Ohio Misc. 113 (Com Pl. 1963).

might be discomfited if he were unable to collect, but that would not make the school board the "State" nor would it subject the State to any potential liability. The judgment herein cannot possibly impact upon the state treasury, for here, as in *Hutchison, supra,* 519 F.2d at 966-967 (9th Cir. 1975):

> "A set amount of state aid is awarded each year on the basis of the number of students an amount which would not be altered by the back pay award in the present case."[81a]

2. The Board's second argument is that Ohio has chosen to immunize school boards from common law tort claims, and that that decision precludes the federal courts from issuing judgments against school boards. (Brief, pp. 29-30). This argument would turn the Supremacy Clause upside down.

The issue in this case is not what immunity is available under state law with respect to violations of state law, but what immunity is available under federal law with respect to violations of the federal Constitution. The resolution of that issue necessarily is one of federal law. Any rule of immunity to be applied "must be a 'federal' one because the federally created cause of action cannot be restricted by state laws or rules relating to sovereign immunity . . ." *Smith* v. *Losee,* 485 F.2d 334, 341 (10th Cir. 1973) (*en*

[81a] Moreover, even if the law of Ohio were that a default by a school board entitled the judgment creditor to look to the state treasury, that would not warrant withholding a monetary award altogether. The Eleventh Amendment would be fully vindicated, in the event of a school board's default, by the federal court refusing to enforce the judgment against the state treasury. Only if an award against a school board would "inevitably" be paid from the state treasury would the Eleventh Amendment justify withholding the award altogether. *Cf. Edelman, supra,* 415 U.S. at 665. On this point we believe Judge Holloway's dissenting opinion to be correct, and the majority opinion of the Tenth Circuit wrong, in *Harris, supra,* 471 F.2d 218.

banc), cert. denied 417 U.S. 908 (1974). Accord: *Jones* v. *Marshall,* 528 F.2d 132, 137 (2nd Cir. 1975); *Dewell* v. *Lawson,* 489 F.2d 877, 882 (10th Cir. 1074). And see *Imbler* v. *Pachman,* — U.S. —, 44 LW 4250, 4255 (1976); *id* at 4258 (dissenting opinion of Mr. Justice White). The Eleventh Amendment provides a federal immunity, and the applicability of that immunity depends upon the powers, characteristics and relationships conferred upon a body by state law, not the labels affixed by the state. It is not within the state's power to bestow Eleventh Amendment immunity upon autonomous political and corporate entities which, because "locally controlled [and] essentially local in character", *Campbell, supra,* 534 F.2d at 676 (5th Cir. 1976), are outside the Amendment's sweep. "[I]t must be remembered that governmental immunity invoked by a state and its agencies is not identical to Eleventh Amendment immunity found in the United States Constitution." *Wright* v. *Houston Independent School District,* 393 F. Supp. 1149, 1153 (S.D. Tex. 1975). It is by no means as clear as petitioner suggests that Ohio would regard the "governmental immunity" which its courts have historically extended to local governments in tort actions—but in no other actions—as applicable in this case.[82] But be that as it may, Ohio's disposition of im-

[82] In *State ex rel. Board of Education* v. *Gibson,* 130 Ohio St. 318, 199 N.E. 185, 186-187 (1938), the court declared unequivocally that school boards in Ohio do *not* share the State's sovereign immunity. The issue in that case, in which a school board brought a contract action as plaintiff, was whether the defendant could invoke the statute of limitations against it. The court reasoned:

> "That a state is immune from the operation of the statute of limitations is universally recognized. The ancient maxim nullum tempus occurrit regi (no time runs against the crown) still prevails. This immunity is an attribute of sovereignty and can only be waived by express provision to that effect within the statute.
>
> "Does such immunity attaching to the state accrue to the benefit of a board of education or school district?
>
> *"This immunity is extended to the state as an attribute of sov-*

munities in state law actions—a matter which it is free to decide any way it wishes, on policy bases similar to or wholly divergent from those underlying the Eleventh Amendment —cannot control the construction of that Amendment.

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ereignty and does not extend to a board of education or school district. Excepting only the sovereign, the law recognizes no distinction in litigants, and the same rule of law is applicable to all.

"A state, as an attribute to its sovereignty, cannot be sued without its consent. When a board of education or school district is clothed with the capacity to sue and be sued, it is thereby rendered amenable to the laws governing litigants, including the plea of the statute of limitations. To give one character of litigants special privileges over other litigants is to create artificial distinctions which have no place in a progressive democracy.

" 'The principle, that the sovereign power of a state is not bound by statutes of limitation, without express words, obtained in the earliest stages of the common law, and has descended to this day. This rule is sometimes of odious application; but it is adopted as incidental to sovereignty, and necessary to preserve against negligence or cupidity, those rights which the state has acquired or retained.

" 'This immunity, however, seems to be an attribute of sovereignty only. No case is found in the books which exempts any other description of person, whether natural or artificial, from the operations of the laws; and none of the reasons for the exemption, apply with much force to municipal corporations. The law imposes upon them the duty of defending the interests which they are created to hold, and has conferred every power necessary to this end.' Lessee of City of Cincinnati v. First Presbyterian Church, 8 Ohio, 298, 299, at page 310, 32 Am.Dec. 718.

" 'Exemption from the operation of the statute is a privilege of soverignty, and this privilege can only be asserted by, or on behalf of the sovereign.' 25 Ohio Jurisprudence, 630.

"A board of education or school district does not partake of the elements of sovereignty and is not entitled to immunity from the statute of limitations.

"The extension of the privileges of sovereignty to others than the general and state governments does not find favor in enlightened jurisdictions. 17 Ruling Case Law, 972, 973.

"Where a statute does not expressly except a subordinate political subdivision from its operation, the exemption therefrom does not exist.

"Where a board of education or school district is subject to suit, it is to be treated, for the purpose of such suit, in the same manner as a private litigant. Not being an entire sovereignty, there is no sound reason for treating it in a manner different from the manner of treating any other litigant. The law should be of universal application and without distinction among litigants. The fact that a board of education or school district is engaged in a public task is an immaterial circumstance. When it is rendered subject to suit without consent, it is automatically stripped of its attribute of sovereignty and of the exemptions and immunities available to sovereignties." (Emphasis added).

Moreover, the Ohio legislature has recently taken action which demonstrates that whatever tort immunity school boards enjoy *is* for reasons divergent from those underlying the Eleventh Amendment and *not* because they partake of the State's sovereignty. In 1975, the Ohio General Assembly abolished the tort immunity of "the State," but not that of "political subdivisions." §§2743.01, 2743.02. The line drawn was precisely that which the Eleventh Amendment draws: the "State" was defined as including state departments and agencies, but excluding "municipal corporations,

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Despite this analysis, the Ohio courts have continued to hold school boards immune from damage liability in *tort* cases. The Ohio Supreme Court explained the dichotomy in *Brown* v. *Board of Education,* 20 Ohio St. 2d 68, 253 N.E. 2d 767 (1969). School boards were "stripped of their sovereignity," as *Gibson* held, when they were rendered suable in § 3313.17. But that section, properly construed, renders them suable only in actions which "relate to" their exercise of the other powers conferred upon them in that section. One of the powers conferred in § 3313.17 is to contract and be contracted with. The instant suit "relates to" the Board's exercise of its contracting power. The Ohio courts have not spoken as to which side of the *Brown* line the instant case would fall on, but it is surely arguable that it falls on the *Gibson* side. This Court need not, of course, resolve this question of Ohio law, for as we have shown above federal principles, and not Ohio law, govern the proper construction of the Eleventh Amendment. We have undertaken this exploration of Ohio law only to show that even on petitioner's own mistaken premise—that Ohio law controls—its assertion of immunity would be doubtful.

townships, villages, counties, *school districts,* [etc.]."[33] This legislative distinction surely did not reflect a judgment that school boards partake more of the State's sovereignty than the State itself. Rather, it reflects the deference which the Ohio General Assembly pays to the autonomy of local school boards: the decision as to their own status was left to them.

As the Board is not the "State," and as the backpay award herein cannot possibly impact upon the state treasury, the Eleventh Amendment does not preclude the award.

CONCLUSION

For the reasons set forth in this brief, the decision below should be affirmed.

Respectfully submitted,

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[33] 2743.01 Definitions
As used in Chapter 2743 of the Revised Code:

(A) "State" means the state of Ohio, including, without limitation, its departments, boards, offices, commissions, agencies, institutions, and other instrumentalities. It does not include polical subdivisions.

(B) "Political subdivisions" means municipal corporations, townships, villages, counties, school districts, and all other bodies corporate and politic responsible for governmental activities only in geographic areas smaller than that of the state to which the sovereign immunity of the state attaches.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

No. 75-1278

MT. HEALTHY CITY SCHOOL DISTRICT
BOARD OF EDUCATION,
Petitioner,

vs.

FRED DOYLE,
Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

REPLY BRIEF OF PETITIONER

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CITATIONS

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REPLY BRIEF OF PETITIONER

ARGUMENT

I. JURISDICTION CAN NOT BE MAINTAINED UNDER 28 U.S.C. SECTION 1331 BECAUSE FRED DOYLE DID NOT HAVE A CLAIM WORTH $10,000 WHEN HE FILED SUIT.

The test to determine the amount in controversy under general federal question jurisdiction is the value to the

plaintiff of the relief he seeks. *Packard* v. *Banton,* 264 U.S. 140, 142 (1924). On July 13, 1971 when Fred Doyle filed suit in Federal District Court, his claim was worth, at most, only the difference between his salary at Mt. Healthy for the 1971-72 school year and what he would earn at Miami Trace — roughly $2,000. The rule established in *Columbian Ins. Co.* v. *Wheelright,* 20 U.S. 534 (1822), that the amount in controversy is the salary of the position in issue, does not apply when other employment has already been obtained, *Kochar* v. *Auburn University,* 304 F.Supp. 565 (M.D. Ala. E.D. 1969); see also *Zartman* v. *Board of Educ.,* 330 Ohio Misc. 217 (1972). Nor can potential loss in earnings be aggregated indefinitely into the future. *Ross* v. *Prentiss,* 44 U.S. (3 How.) 771 (1845). *Cf. Eisen* v. *Eastman,* 421 F.2d 560, 566 (2d Cir. 1969); *Dougall* v. *Sugarman,* 330 F.Supp. 265 (S.D. N.Y. 1971). Furthermore the court cannot determine the value of a continuing contract at Mt. Healthy as opposed to a one year contract at Miami Trace without engaging in the kind of wild speculation that Counsel for Doyle finds so objectional when considering alternative employment. (Respondent's Brief pp. 20, 21)

The fact is that when Doyle filed suit he was under contract with Miami Trace. The value of that contract would be (and was) offset against his potential earnings at Mt. Healthy, leaving him a claim, when the action was instituted, of only approximately $2,000 in loss of salary. For the reasons stated in Petitioner's Brief at pages 21-23 — and not disputed by Respondent — the other relief sought in the original complaint does not increase the value of the claim.

Nor, under the reasoning of *Bishop* v. *Wood,* — U.S. —, 48 L.Ed.2d 684 (1976), can Doyle claim a property interest in his job since he had not yet obtained

tenure. Under Ohio law[1] tenure is created by statute. Until the statutory requirements are met, a teacher has no right to reappointment or continuing employment from year to year. Therefore no monetary value can be

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[1] Section 3319.11 of the Ohio Revised Code reads:

"3319.11 Continuing service status and contract; limited contract; failure of board or superintendent to act

Teachers eligible for continuing service in any school district shall be those teachers qualified as to certification, who within the last five years have taught for at least three years in the district, and those teachers who, having attained continuing contract status elsewhere, have served two years in the district, but the board of education, upon the recommendation of the superintendent of schools, may at the time of employment or at any time within such two-year period, declare any of the latter teachers eligible.

Upon the recommendation of the superintendent that a teacher eligible for continuing service status be reemployed, a continuing contract shall be entered into between the board and such teacher unless the board by a three-fourths vote of its full membership rejects the recommendation of the superintendent. The superintendent may recommend re-employment of such teacher, if continuing service status has not previously been attained elsewhere, under a limited contract for not to exceed two years, provided that written notice of the intention to make such recommendation has been given to the teacher with reasons directed at the professional improvement of the teacher on or before the thirtieth day of April, and provided that written notice from the board of education of its action on the superintendent's recommendation has been given to the teacher on or before the thirtieth day of April, but upon subsequent re-employment only a continuing contract may be entered into. If the board of education does not give such teacher written notice of its action on the superintendent's recommendation of a limited contract for not to exceed two years before the thirtieth day of April, such teacher is deemed re-employed under a continuing contract at the same salary plus any increment provided by the salary schedule. Such teacher is presumed to have accepted employment under such continuing contract unless he notifies the board in writing to the contrary on or before the first day of June, and a continuing contract shall be executed accordingly.

A teacher eligible for continuing contract status employed under an additional limited contract for not to exceed two years pursuant

given to Doyle's eligibility for tenure. In short, Respondent cannot meet the jurisdictional requirements of 28 U.S.C. § 1331.

II. THE BOARD OF EDUCATION DID NOT RELY ON THE PHONE CALL TO WSAI IN REACHING ITS DECISION NOT TO REAPPOINT FRED DOYLE.

There is no evidence in the record that the Board relied on the WSAI call. As noted by Judge Hogan in the District Court:

> "The superintendent and each of the four board members, who testified in this case, testified that his or her vote or recommendation was not based in any way on any activity of the plaintiff in the free speech or assemblage field." (A. p. 26)

The judge further stated that there were permissible reasons for the non-renewal:

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to written notice from the superintendent of his intention to make such recommendation, is, at the expiration of such limited contract, deemed re-employed under a continuing contract at the same salary plus any increment granted by the salary schedule, unless the employing board, acting on the superintendent's recommendation as to whether or not the teacher should be re-employed, gives such teacher written notice of its intention not to re-employ him on or before the thirtieth day of April. Such teacher is presumed to have accepted employment under such continuing contract unless he notifies the board in writing to the contrary on or before the first day of June, and a continuing contract shall be executed accordingly.

A limited contract may be entered into by each board with each teacher who has not been in the employ of the board for at least three years and shall be entered into, regardless of length of previous employment, with each teacher employed by the board who holds a provisional or temporary certificate.

Any teacher employed under a limited contract, and not eligible to be considered for a continuing contract, is, at the expiration

> "In fact, as this Court sees it and finds, both the Board and the Superintendent were faced with a situation in which there did exist in fact reason — (see *James* v. *West Virginia,* 322 F.Supp. 217 (S.D. W. Va. 1971), *aff'd* 448 F.2d 785 (4th Cir. 1971)) — independent of any First Amendment rights or exercise thereof, to not extend tenure." (A. pp. 27, 28).

These findings are supported by the record. In the examination of Vivian Clark the following exchange took place:

> "Q. At any time did Mr. Ralph or anyone else say that the mere calling of WSAI justified the nonrenewal of Mr. Doyle's contract?
> A. No, of course not." (A. p. 237, T. 447)

When a similar question was put to William Charles Lippmeier his response was an emphatic: "No, he did not." (A. 230, T. 435) And the testimony as a whole indicates that the Board's decision was premised on a unanimous concern about Doyle's lack of maturity as demonstrated in all the

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of such limited contract, deemed re-employed under the provisions of this section at the same salary plus any increment provided by the salary schedule unless the employing board, acting on the superintendent's recommendation as to whether or not the teacher should be re-employed, gives such teacher written notice of its intention not to re-employ him on or before the thirtieth day of April. Such teacher is presumed to have accepted such employment unless he notifies the board in writing to the contrary on or before the first day of June, and a written contract for the succeeding school year shall be executed accordingly. The failure of the parties to execute a written contract shall not void the automatic re-employment of such teacher.

The failure of a superintendent of schools to make a recommendation to the board of education under any of the conditions set forth in this section, or the failure of the board of education to give such teacher a written notice pursuant to this section shall not prejudice or prevent a teacher from being deemed re-employed under either a limited or continuing contract as the case may be under the provisions of this section."

other incidents. (A. 191, 196, 209, 213, 225, 239, 268) (T. 350, 356, 397, 403, 427, 449, 523) Counsel for Doyle distorts the record when he speaks of the Board's reliance on the WSAI incident (Respondent's Brief pp. 12, 25, 34, 40). The record shows that the same decision would have been reached without the call.

III. THE MT. HEALTHY BOARD OF EDUCATION IS A MERE PUBLIC AGENCY OF THE STATE ESTABLISHED FOR THE SOLE PURPOSE OF ADMINISTERING THE STATE SYSTEM OF PUBLIC EDUCATION AND AS SUCH IS ENTITLED TO ELEVENTH AMENDMENT IMMUNITY.

Ohio law consistently holds that school districts are mere public agencies of the state clothed with the same immunity as the state. *Finch* v. *Board of Educ.*, 30 Ohio St. 37 (1876); *Board of Educ.* v. *Volk*, 72 Ohio St. 469, 74 N.E. 646 (1905); *Board of Educ.* v. *McHenry, Jr.*, 106 Ohio St. 357, 140 N.E. 169 (1922); *Elias* v. *Newton*, 53 Ohio App. 38, 4 N.E.2d 146 (1936); *Shaw* v. *Board of Educ.*, 17 Ohio Law Abs. 588 (App. 1934); *Hall* v. *Columbus Board of Educ.*, 32 Ohio App. 2d 297 (1972). See also *Dunn* v. *Brown County Agricultural Society*, 46 Ohio State 93, 96, 18 N.E. 496 (1888).

School districts are not liable in an action for damages unless made so by a legislative enactment which clearly, in terms which are neither doubtful nor ambiguous, imports a legislative intention to abrogate or modify the rule of immunity. Thus in *Conrad* v. *Board of Educ.*, 29 Ohio App. 317, 163 N.E. 567 (1928), the Court refused to hold the district liable for a shop accident even though a safety statute had been violated.

Similarly statutes simply granting authority to a board of education to sue or be sued and granting broad powers to contract and to acquire, use, and dispose of property for school purposes,[2] do not affect the board's tort immunity. *Board of Education* v. *Volk*, 72 Ohio St. 469, 74 N.E. 646 (1905). See Petitioner's Brief pp. 31, 32.

Likewise, a permissive statute[3] providing that a board may issue bonds to pay a judgment against it cannot, standing alone, create a liability where none otherwise exists. *Shaw* v. *Board of Educ.*, 17 Ohio Law Abs. (mco Oct. 3, 1934).

In fact, Section 133.27, Ohio Revised Code, is a very narrow grant of power. Respondent argues that the Board is authorized by statute to sell bonds to pay a judgment under Section 133.27, Revised Code. (Respondent's Brief p. 54). Respondent, however, neglects to point out that Article XII, Section 11, of the Ohio Constitution[4] provides that bonded indebtedness of the state or a political subdivision – including the school district – cannot be incurred unless the authorizing unit provides for a levy to pay the interest and to provide a sinking fund for the final redemption of the bonds at maturity. Article XII, Section 2, of the Constitution[5] limits unvoted property

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[2] Section 3313.17, Ohio Revised Code, Petitioner's Brief p. 60.

[3] Section 133.27, Ohio Revised Code, Respondent's Brief p. 54, n. 29.

[4] Article XII, Section 11 of the Ohio Constitution reads:

"No bonded indebtedness of the state, or any political subdivisions thereof, shall be incurred or renewed, unless, in the legislation under which such indebtedness is incurred or renewed, provision is made for levying and collecting annually by taxation an amount sufficient to pay the interest on said bonds, and to provide a sinking fund for their final redemption at maturity."

[5] Article XII, Section 2 of the Ohio Constitution reads:

"No property, taxed according to value, shall be so taxed in excess of one per cent of its true value in money for all state

taxes to one percent of the true value of the property; additional taxes outside that limit may be levied only if approved by the voters. Article XII, Section 2, along with Section 5705.02 Revised Code[6] which establishes this 10 mill limit on property taxes, operates as an indirect limit on the taxing authority's power to issue bonds. In short, the school district can not sell unvoted general obligation bonds to pay the judgment unless it can cover the debt service within the ten-mill limit on taxes. Since the school district's share of ten-mills is already committed, the Board can not issue unvoted bonds to pay the judgment.

This construction is supported by a 1934 opinion of the

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and local purposes, but laws may be passed authorizing additional taxes to be levied outside of such limitation, either when approved by at least a majority of the electors of the taxing district voting on such proposition, or when provided for by the charter of a municipal corporation. Land and improvements thereon shall be taxed by uniform rule according to value, except that laws may be passed to reduce taxes by providing for a reduction in value of the homestead of residents sixty-five years of age and older, and providing for income and other qualifications to obtain such reduction. All bonds outstanding on the 1st day of January, 1913, of the state of Ohio or of any city, village, hamlet, county or township in this state, or which have been issued in behalf of the public schools of Ohio and the means of instruction in connection therewith, which bonds were outstanding on the 1st day of January, 1913, and all bonds issued for the world war compensation fund, shall be exempt from taxation, and without limiting the general power, subject to the provisions of Article I of this constitution, to determine the subjects and methods of taxation or exemptions therefrom, general laws may be passed to exempt burying grounds, public school houses, houses used exclusively for public worship, institutions used exclusively for charitable purposes, and public property used exclusively for any public purpose, but all such laws shall be subject to alteration or repeal; and the value of all property so exempted shall, from time to time, be ascertained and published as may be directed by law."

[6] Petitioner's Brief p. 10a.

Attorney General (1934 OAG No. 3266, p. 1416, 1421) which reads:

> "Without a doubt, a board of education could by mandamus be required to provide by a levy for current expenses for the payment of judgments . . . . But the issuance of such a writ is undoubtedly subject to some limitations at least. In the first place *the levy which the taxing authority of a subdivision may make for current expenses is limited by the ten mill limitation* and by the action of the budget commission in making adjustments of tax levies as required by Section 5625-4, General Code, [now 5705.04 O.R.C.] and made necessary by reason of statutory limitations and the requirements of mandatory levies provided for by Section 5625-23, General Code [now 5705.31 O.R.C.]. (emphasis added)

Respondent also argues that the taxing authority of the district is broad enough to cover funds to pay a judgment. (Respondent's Brief p. 55) However, Sections 5705.03, 5705.192, and 5705.194, cited by Respondent, all require that the tax be voted. If the voters refuse to pass the levy, the board cannot raise money through those tax provisions. In sum, the local district does not have free wheeling authority to raise funds to pay a judgment for a tort liability in Ohio because in Ohio local districts have only narrowly defined statutory powers. Under the pocketbook test of *Edelman* v. *Jordon,* 415 U.S. 651 (1974), discussed in Petitioner's Brief p. 30, the Mt. Healthy School District is protected by the sovereign immunity of the state.

This reading of eleventh amendment immunity is supported by *Jagnandan* v. *Giles,* 538 F.2d 1166 (5th Cir. 1976), which barred reimbursement of excess tuition paid to a state university on eleventh amendment grounds. In the present case, as in *Jagnandan,* there is no federal legis-

lation authorizing federal courts to award money damages. Consequently *Fitzpatrick* v. *Bitzer,* — U.S. —, 96 S.Ct. 2666, 49 L.Ed.2d 614 (1976), which permitted retroactive payments from a state retirement fund is not controlling.

In *Fitzpatrick,* Congress had passed Title VII of the Civil Rights Act thereby exercising its authority to enforce section 5 of the fourteenth amendment. *Fitzpatrick* held that the balance between the eleventh and fourteenth amendments must be struck in favor of the fourteenth when Congress has passed specific legislation pursuant to section 5 to enforce the rights guaranteed by the fourteenth amendment. Absent such specific legislation however *Edelman, supra,* is controlling. See *Jagnandan, supra. Edelman* barred recovery in cases such as the present one when relief would have to come from the state on grounds that the eleventh amendment controls.

Respectfully submitted,

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